IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN MILLER et al. v. NISSAN MOTOR ACCEPTANCE CORPORATION	:	CIVIL ACTION NO. 99-4953

MEMORANDUM

Dalzell, J. October 27, 2000

Representatives of a putative class of consumers here bring various claims against an automobile lessor, alleging improprieties associated with the early termination provisions of their leases and with the practices involved in early termination of these leases. We now consider the parties' cross-motions for summary judgment, an enterprise that necessarily will take us into the economics of car leasing.

I. Background

A. Facts

1. The Lease Transactions

The plaintiffs, Brian Miller and Michael and Michelle Rose, each entered into a closed-end automobile lease agreement with the Nissan Motor Acceptance Corporation ("NMAC"). Miller's lease, for a 1997 Nissan Altima, was executed on December 26, 1996 and was a closed-end thirty-six month lease to end in December, 1999. Under his lease, Miller's monthly payments were $267. The Roses' lease, for a 1996 Nissan Altima GXE, was executed on March 25, 1996 and was a closed-end thirty-nine month lease that was to end in June of 1999. The Roses' monthly payments under the lease were $237.87.

Both of these leases contained identical early termination clauses, which provide:

> **18. Early Termination Liability:** At any time after **12** monthly payments have been paid, I [the lessee] may terminate this lease on the due date of a monthly lease payment if this lease is not in default as disclosed in paragraph 19[1], and I have given you [NMAC] **30** days written notice. Except as otherwise provided in paragraph 22[2], if I terminate early, in addition to the amounts indicated in items a through d of paragraph 17[3], I must pay you an Early Termination Charge which is determined as follows: First, all monthly lease payments, which under the terms of this lease, are not yet due and the residual value of the Vehicle are discounted to present value by the Constant Yield Method at the rate implicit in this lease (the "Adjusted Lease Balance"). This amount is then reduced by the Realized Value (and insurance loss proceeds)[4] which you receive for the Vehicle.

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[1]Paragraph 19 details the circumstances defining "default".

[2]Paragraph 22 deals with what happens if the vehicle is lost through theft or destruction and NMAC accepts an insurance settlement.

[3]Paragraph 17 is entitled "termination liability", and states that upon the contractual termination the following sums are due to NMAC: (1) a "disposition fee" of the lesser of $250 or two monthly payments; (2) all past due monthly payments, late charges, and other charges; (3) any amounts due from excess wear and tear as defined in paragraph 16 of the agreement; (4) any excess mileage charge at lease maturity, or a pro-rated excess mileage charge for the period the lease was in effect. Paragraph 17 also states that for an early termination, an additional fee would be due as defined in paragraph 18, which is quoted in the text above.

[4]This language is from the Miller lease. The pertinent (continued...)

> The balance due you is the Early Termination Charge which I will pay to you immediately. If there is an excess, however, you will not refund it to me.
>
> The Realized Value will be determined in one of the following ways:
> a. You and I may enter into a written agreement as to the Vehicle's value;
> b. Within **10** days after I return the Vehicle, I may obtain at my expense, from an independent third party agreeable to both of us, a professional appraisal of the wholesale value of the Vehicle, which could be realized at sale at the end of the lease term; or
> c. If the Realized Value isn't determined under (a) or (b), then you will attempt to determine the Realized Value in a commercially reasonable manner in accordance with accepted practices in the automobile industry for determining the value of used vehicles.
>
> If you terminate this lease because I am in default under paragraph 19, in addition to the Early Termination Charge disclosed above, I must pay your costs of repossessing, storing and transporting the Vehicle as well as your costs of collection, including your court costs and your reasonable attorneys' fees to the extent permitted by applicable state law. Defaults of this lease are specified below.

Rose Lease, Ex. Rose-2, R. at 327[5], Miller Lease, Ex. Miller-2, R. at 362.

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[4](...continued) part of the Rose lease reads, ". . . Realized Value (and insurance) proceeds which you receive . . ." This difference in language is not material to any issue of concern here.

[5]As an appendix to its instant motion, the defendant has attached complete copies of the relevant depositions, together with the exhibits used in those depositions. This 469-page record has been Bates-numbered. The parties have, helpfully, both cited to this appendix in their briefs, and thus our citations in the form "R. at _____" are citations to this record.

Miller and the Roses[6] both made inquiries and took actions with respect to early termination of their leases. In March, 1999, Miller telephoned NMAC to find out what the early termination amount for his lease would be. He was given a number over the phone, and he asked that he be given it in writing, see Dep. of Brian Miller, R. at 339. Subsequently, Miller received a letter from NMAC dated March 4, 1999 in which NMAC reported that the early termination liability would be $3,064.81, an amount which included (1) the ten remaining lease payments at $267 per month[7], (2) a $350 disposition fee, (3) taxes due in the amount of $31.50, and (4) a late fee of $13.35, see Ex. Miller-7, R. at 389. The letter also noted that, "It would be a less expensive option for you to simply pay the remaining rents owed on the lease," Ex. Miller-7, R. at 389. Miller recalls that the number in the letter was less than the number he was quoted on the phone, see Dep. of Brian Miller, R. at 340[8].

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[6]Although we discuss their circumstances in parallel here, Miller and the Roses are not personally acquainted, see Dep. of Brian Miller, R. at 338.

[7]This monthly lease payment includes tax.

[8]According to the NMAC's computerized records, which record every inquiry made with respect to an account, the amount quoted to the caller on March 3, 1999 was $16,040.09, see Ex. Holloway-2 at 53, R. at 110. However, this figure was for a lease "payoff" (under which the lessee would terminate the lease and purchase the vehicle) rather than for an early termination, see Dep. of Judith Holloway, R. at 21. A "payoff" quotation is the same as a quote for the early termination liability calculated using the paragraph 18 formula except that the "realized" (or "wholesale") value is not subtracted out, see Dep. of Judith Holloway, R. at 35.

Ultimately, Miller decided not to terminate his lease in March of 1999. However, on November 16, 1999 -- slightly over one month before the end date of the lease (December 26, 1999) -- Miller did terminate the lease in the process of "trading-in" the leased 1997 Altima vehicle while entering into a new lease for another Nissan automobile. As part of this termination of the lease, Miller paid the last monthly payment due on the lease, see Dep. of Brian Miller, R. at 345-46[9]. After he ended the lease, Miller received a lease termination notice from NMAC dated December 2, 1999, which invoiced Miller for a variety of lease termination charges, including wear and tear damages, an "unsatisfied contract obligation", and a "disp[osition] fee", see Ex. Miller-9, R. at 391, but apparently Nissan waived these charges and as far as Miller is concerned the only early termination fee he paid in conjunction with the termination was the last month's rental payment, see Dep. of Brian Miller, R. at 346.

Similarly, on March 23, 1999 -- almost three months before the lease end date of June 25, 1999 -- the Roses turned in their leased car as part of a trade-in for a new one. Subsequently, the Roses received an invoice from NMAC and paid $1697.26 as a result of the lease termination, see Ex. Rose-3, R.

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[9] The invoice for that last monthly payment is Ex. Miller-8, R. at 390. Miller's deposition testimony is unclear as to whether he paid that last payment to the leasing dealership on November 16, 1999, or whether he instead waited until he received the invoice and then paid it.

at 329. This sum included a disposition fee, charges for excess wear and tear, and an early termination fee equal to the two monthly lease payments remaining on the lease, or $480.10.[10]

2. Lease Economics and NMAC Leasing Procedures

It is impossible coherently to address the disputes between the parties without first discussing some of the fundamental concepts and processes that drove the Miller and Rose leases from NMAC's side of the transaction.

a. Derivation of the Monthly Lease Payment

We will begin with the concept of how the monthly lease payment was calculated for the Rose and Miller leases. This calculation is done using a "Dealer Lease Worksheet" that is not disclosed to the consumer, see Dep. of Robin Norris, R. at 148, Ex. Baird-7, R. at 290 (Rose Worksheet), Ex. Baird-12, R. at 295

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[10] The derivation of this charge in the evidence is a bit involved. The record does not contain a copy of the invoice that the Roses paid in June 1999, but does contain an invoice dated September 20, 1999 by which NMAC refunded $250 to the Roses, see Ex. Rose-4, R. at 331. From this invoice it appears that because of the timing of the lease termination, NMAC originally thought that there were three monthly payments outstanding on the lease, and charged the Roses for that amount, while in fact the Roses had sent in a monthly payment shortly before termination. Thus, there were in fact only two monthly payments outstanding, and the money refunded to the Roses in September reflects this. In any event, there appears to be no dispute that the early termination charge levied on the Roses was the amount of the two remaining monthly payments, see Dep. of Michael Rose, R. at 312-14, and the exact dollar figure of the charge is not material to the dispute here, which centers on the components and derivation of that charge rather than on the precise amount.

(Miller Worksheet)[11]. The monthly lease payment Rose and Miller paid was comprised of three components: (1) a depreciation payment, (2) a lease charge, and (3) a tax payment. The depreciation payment and lease charge[12] were themselves derived, using formulas on the worksheet, from other variables the dealer entered, in the following manner.

The dealer started with the manufacturer's suggested retail price (MSRP) for the car, and then added to that amount dollars for certain extras added to the car[13]. This addition resulted in the "Adjusted MSRP". The dealer then multiplied this number by a certain percentage -- 61% for the Rose lease, 65% for the Miller lease -- to obtain the "residual value". The derivation of these percentages is an important part of the story here, and will be discussed further below, but suffice for the moment to say that the residual value is associated with the value of the car at the end of the lease.[14]

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[11]A copy of the Nissan Dealer Bulletin promulgating the dealer worksheet used with the Miller lease is in the record in Ex. Holloway-2 at 13-16, R. at 70-73. This form was a revision of the form used in conjunction with the Rose lease, though none of the differences are material with respect to the issues raised in this case.

[12]The tax payment on both leases was 9% of the other two charges on both leases, and, since it is not an issue, warrants no further discussion here.

[13]These options appear to be dealer-added options, and include things like a motion detection system or a leather interior. Neither Miller's nor the Roses' car had any such option additions.

[14]As will be addressed at length below, the residual
(continued...)

The dealer then calculated the "net cap value" of the car, which is the "selling price" reduced by, for example, trade-in value of the lessee's old vehicle or any down payment provided by the lessee, see Dep. of Jon Baird, Sept. 17, 1998, R. at 252,[15] and increased by, for example, an "acquisition fee".

For its own part, the "selling price" used in the Miller and Rose lease calculations evidently represented the dealer's own discount off of the Adjusted MSRP, as in the Rose lease the "selling price" is around $1700 less than the Adjusted MSRP and in the Miller lease it is around $3100 less. In any event, it is this "selling price", plus the "acquisition fee", but minus the trade-in and down payment, that yields the "net cap value". Here, both Miller and the Roses had a $350 "acquisition fee" added to their "selling price", and the Roses paid $21.22 down. Neither had any trade-in.

The dealer thus had three numbers: the Adjusted MSRP, the residual value, and the net cap value. The "lease charge" portion of the monthly payment was calculated by summing the

[14](...continued)
value, particularly not those used in conjunction with these leases, was not actually intended to equal the market value of the car at the end of the lease.

[15]Baird worked for NMAC as a corporate manager in charge of, inter alia, leasing. Two depositions of him are present in the record for this case: one taken on March 28, 2000 in conjunction with this lawsuit and another taken on September 17, 1998 in the case of Applebaum v. Nissan Motor Acceptance Corporation, a suit involving a dispute over an identical early termination lease clause, and which we will discuss more below. The parties stipulated to add the earlier deposition, in which Baird discusses lease financing, to the record in this case.

Adjusted MSRP and the residual value, and multiplying the result by a "money factor." This "money factor" was .00249 for the Rose lease and .00316 for the Miller lease. According to NMAC's deponent, the "money factor" is "a factor that the dealers use to calculate a base rent based on a cost," and is based on the cost of the leased property and the length of the lease, Dep. of Jon Baird, Sept. 17, 1998, R. at 252. Naturally, given the derivation of the lease charge, the lower the "money factor" is, the lower the monthly payments are. Evidently, at the time the Roses and Miller leased their vehicles, Nissan had put in place a special program in the Northeast region to push Altima leases, whereby the "money factor" was lower than it would otherwise have been, thus lowering lease payments, see Dep. of Robin Norris, R. at 142.

The other component of the monthly lease payment, the depreciation payment, was calculated by subtracting the residual value from the net cap value, and dividing the result by the term of the lease in months. That is, under this calculation, the total "depreciation" of the vehicle over the span of the lease (for lease pricing purposes anyway) was the difference between a number standing for the value of the car at the start of the lease (the net cap value) and a number standing for the expected value of the car at the end of the lease (the residual value); that total depreciation was divided by the number of monthly payments to be made to obtain the monthly depreciation payment component. The important point here is that the higher the residual value is, the lower total depreciation is, and thus the lower the monthly payment will be.

Using these calculations, the dealer arrived at monthly payment figures for Miller and the Roses. Miller's total payment was $267, of which $138.18 was depreciation, $106.77 was lease charge, and $22.05 was tax. The Roses' total payment was $237.87, of which $144.83 was depreciation, $73.40 was lease charge, and $19.64 was tax.

b. The Residual Value

As discussed above, the residual value assigned to the car at the inception of the lease is quite significant to the price of the lease to the lessee, since it determines, in great part, the depreciation portion of the lease payment. Residual value is also significant in calculating the early termination charge through the formula contained in paragraph 18 of the lease, which was set forth in its entirety above. As can be seen in paragraph 18, one component of the early termination charge is the residual value of the car discounted to present value; that is, the higher the residual value is, ceteris paribus, the higher the early termination charge will be. As will be detailed below, the plaintiffs have made various allegations regarding the nature of the residual values used in their leases, and therefore, before we discuss how NMAC calculated the early termination fees that were charged to Miller and the Roses, it makes sense to discuss in some detail the derivation of the residual value for the Miller and Rose vehicles.

The residual values for various Nissan cars were set by a committee composed of executives from, inter alia, the Nissan Motor Company and NMAC. These executives included Nissan Motor Company's vice-president of finance, NMAC's vice-president of finance, as well as a representative from Nissan Motor Company's sales department and a marketing representative from either NMAC or the Nissan Motor Company, see Dep. of Robin Norris, R. at 132. This committee reviewed data presented to it by Nissan Motor Company's finance department relating to the forecasted market values of various models at the end of expected lease periods[16], including current sales performance, current market value, and historical market value information, see Dep. of Robin Norris, R. at 133. In creating this information, the Nissan Motor Company would look to historical recovery values at auction, as well as values provided by outside sources such as the Kelly Blue Book, and compare these to previously-set residual values. A "regression analysis" was then performed to predict future values on a model by model-year basis, Dep. of Robin Norris, R. at 136, 137. From all this information, the committee would arrive at the "revenue neutral" residual values.[17] Nissan considers these to represent an actual estimate of what the future values of

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[16]That is, looking to the future values of cars that were yet to be leased.

[17]Also called the "standard" residual values.

various cars would be, expressed in percentage terms[18] on a model and model-year basis, and for different lease terms. see Dep. of Robin Norris, R. at 137.

After the committee arrived at a set of revenue neutral residual values (which it did about once each calendar quarter), these would be circulated for approval among various executives. When circulated for approval, the newly-designated revenue neutral residuals were placed in a table for comparison with the previous quarter's residuals, as well as with the residuals for Nissan cars in the Automotive Leasing Guide (ALG), a disinterested industry publication, whose predicted values were used as a benchmark, see Dep. of Robin Norris, R. at 151.[19]

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[18] That is, per the lease calculation, as a percentage of the Adjusted MSRP.

[19] An example of such a table and approval signature sheet is located in the record in Ex. Holloway-2 at 24-26, R. at 81-84. While this is not the sheet for the period in which the Roses and Miller leased their vehicles, it is evidently the earliest example of such a sheet that NMAC could produce. In deposition testimony, Robin Norris, who was assistant controller and controller for NMAC during the period in question, did not suggest that this form was not representative of what would have been used at the time of the Miller and Rose leases, see Dep. of Robin Norris, R. at 151.

We also note here that the high level of interest that Nissan had in the setting of residual values followed from the fact that those values represented a potential risk to Nissan. In particular, the ALG values were used as a benchmark because if the Nissan-set values were higher than the ALG values, it would suggest a real exposure to loss. If the ALG numbers were correct, then Nissan would be estimating that its vehicles' values at the end of the lease would be higher than their actual market value, and thus Nissan would hold assets (the vehicles) that were worth less than the value Nissan had assigned to them, see Dep. of Robin Norris, R. at 152-53.

This "revenue neutral" residual value was not, however, the residual value used for either the 1996 Altima GXE that the Roses leased or the 1997 Altima that Miller leased. Instead, in the lease calculations for Miller and the Roses used a higher residual value, a value referred to as the "contract" residual value or the "marketing" residual value. The revenue neutral residual values the committee prepared and circulated for executive approval were used as a "starting point" for residual values for NMAC's marketing programs, see Dep. of Robin Norris, R. at 138. If the marketing department wanted to design an incentive program for leasing on a particular vehicle, it would designate a higher residual value for use on that model and year of car because doing so would lower the customer's monthly payment and that, in turn, would increase lease sales, see Dep. of Robin Norris, R. at 139.[20] As noted in the margin above,

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[20]In fact, the markup of the residual value was internally accounted for as a "selling expense", see Dep. of Robin Norris, R. at 139. To aid the financial department in calculating these expenses for each lease, a document was prepared by the NMAC Marketing Department that listed, for each model and model-year car, both the revenue neutral residual value and the contract residual value for various lease terms (again, as always, expressed in percentage terms); this document made clear the difference between the two residual values, see Dep. of Robin Norris, R. at 143. Exhibit Norris-1, R. at 183-84, contains two examples of such documents. Page 1 of Norris-1 shows the revenue neutral and contract residuals effective in October through December 1996, which encompasses the period during which Miller entered into his lease. For a 36 month lease on his car, a 1997.5 Altima (although his lease shows that Miller had a 1997 Altima, apparently it was technically a 1997.5 vehicle), the revenue neutral residual was 56% and the contract residual was 65%. Page 2 of Norris-1 shows the revenue neutral and contract residuals effective in January through April 1996,
(continued...)

setting the contract residual value -- the value actually used in the lease -- higher than the revenue neutral residual value created a contingency that the amount recovered for the car at the end of the lease[21] would be less than the assigned contract residual value. In fact, NMAC recognized that by setting these higher contract residuals, it was unlikely that it would recover the amount of contract residuals at the end of the lease, see Dep. of Robin Norris, R. at 139-40.

In any event, once NMAC had developed these contract residual values, they were transmitted to the dealerships via NMAC's monthly dealer bulletins, see Dep. of Robin Norris, R. at

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[20](...continued) the period during which the Roses entered into their lease. For a 39 month lease on their car, a 1996 Altima, the revenue neutral residual is 49% and the contract residual is 59%.

[21]That is, when NMAC sold the car off. There are, however, ways to hedge against such a risk. With respect to this, between April 1994 and March 1999 a "collateral transfer agreement" existed between Nissan Motor Company and NMAC, under the terms of which Nissan Motor Company agreed to buy off-lease vehicles from NMAC for the contract residual price if the leases were either full term or if they were terminated early and the lessee paid the remaining lease payments (NMAC did not pay the residual price if the lessee terminated early and paid the early termination liability defined in paragraph 18 of the lease), see Dep. of Judith Holloway, R. at 36. The reasoning behind this agreement was that since Nissan Motor Company controlled the prices of new vehicles -- which affects the market value for used vehicles -- it should have "financial responsibility" for the lease portfolio, see Dep. of Robin Norris, R. at 135. On the other hand, since NMAC was wholly owned by Nissan Motor Company, this agreement was effectively only an intra-company transfer of risk, see Dep. of Robin Norris, R. at 135.

It is also possible for a lessor to purchase residual value insurance, but neither NMAC nor Nissan Motor Company had such insurance during the period pertinent to this case, see Dep. of Robin Norris, R. at 135.

141.[22] Exhibit Holloway-2 at 2, R. at 59, is the NMAC Dealer Bulletin that set the numbers for the Rose lease. Effective March 21, 1996, it announced the "1996 Altima Special Lease Northeast Region Dealers" and listed, inter alia, contract residuals and money factors for use in various term leases for 1996 Altimas. For a 39 month lease, the Bulletin set a contract residual of 59% and a money factor of .00249. The Roses' actual contract residual was 61%, reflecting an additional 2% increase because the lease was a low-mileage lease, see Dep. of Robin Norris, R. at 147.

Exhibit Holloway-2 at 5, R. at 62, is the NMAC Dealer Bulletin providing the numbers for the Miller lease. For a 36 month lease for a 1997.5 Altima, it listed a contract residual of 65% and a money factor of .00316.

The contract residual value that was used is not disclosed as such in the Miller or Rose leases, although the dollar value of the contract residual value was used as the "purchase option price" in paragraph 7 of the leases. See Dep. of Robin Norris, R. at 160; Dep. of Judith Holloway, R. at 8.

c. The Paragraph 18 Early Termination Formula

Having discussed the provenance of the residual values used in the Miller and Rose leases, we now move to discuss the

[22] The dealers are evidently unaware of the revenue neutral residual values NMAC set.

formula for calculating the early termination charge that is contained in paragraph 18 of the Miller and Rose leases.

The text of that provision states the formula to be:

> First, all monthly lease payments, which under the terms of this lease, are not yet due and the residual value of the Vehicle are discounted to present value by the Constant Yield Method at the rate implicit in this lease (the "Adjusted Lease Balance"). This amount is then reduced by the Realized Value (and insurance loss proceeds) which you receive for the Vehicle. The balance due you is the Early Termination Charge which I will pay to you immediately.

We have discussed above the derivation of the "monthly lease payments"[23] and the "residual value of the vehicle" that are part of this formula. Several other terms of this formula, however, need further discussion. As our Court of Appeals recently noted, the "constant yield method" is "a technical term with a specified meaning" that the Federal Reserve Board has defined, Applebaum v. Nissan Motor Acceptance Corp., No. 99-1373, 2000 WL 1225805 at *6 (3d Cir. Aug. 30, 2000). As there is no dispute here between the parties regarding the nature of the discounting[24], we will not discuss this process further.

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[23]We note that the "monthly lease payment" used in this formula is the base vehicle rent (that is, the depreciation charge and the lease charge) without tax added, see Dep. of Jon Baird, Sept. 17, 1998, R. at 257, see also Ex. Holloway-2 at 56, R. at 113, Aff. of Mark Hoover, R. at 458.

[24]The parties do have concerns about the fact of discounting, in particular whether early termination charges consisting of the remaining lease payments -- such as those incurred by Miller and the Roses -- are to be discounted to present value, but the means and nature of this discounting is (continued...)

The next variable we consider is the "rate implicit in the lease." The rate implicit in the lease is not designated ex ante. Instead, it is derived from the other variables in the lease after the lease is entered into, see Dep. of Jon Baird, Mar. 28, 2000, R. at 208; this is to say, until the various values in the lease are entered into the lease computer system, the implicit rate is not known. The rate implicit in the lease[25] is a function of the term of the lease, the contract residual value assigned to the lease, and the net cap value calculated at the beginning of the lease, see Dep. of Jon Baird, Sept. 17, 1998, R. at 254, R. at 255. Interestingly, the rate implicit in the lease bears no direct relationship to the "money factor" NMAC determines and uses in calculating the monthly lease payment for each lease, see Dep. of Jon Baird, Sept. 17, 1998, R. at 252.

The last variable in the early termination clause formula is the "realized value"[26], which, according to paragraph 18, is the amount that NMAC receives for the off-lease vehicle. Paragraph 18 itself designates three possible ways in which the realized value can be derived:

> a. You and I may enter into a written agreement as to the Vehicle's value;

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[24](...continued) (mercifully) not at issue.

[25]Also referred to as the "run rate" or, alternatively, the "incremental rate of return" (IRR) when calculated on a monthly basis.

[26]Sometimes called the "wholesale" value, see Dep. of Judith Holloway, R. at 9.

> b. Within **10** days after I return the Vehicle, I may obtain at my expense, from an independent third party agreeable to both of us, a professional appraisal of the wholesale value of the Vehicle, which could be realized at sale at the end of the lease term; or
> c. If the Realized Value isn't determined under (a) or (b), then you will attempt to determine the Realized Value in a commercially reasonable manner in accordance with accepted practices in the automobile industry for determining the value of used vehicles.

Here, to the extent that early termination charges were calculated using the paragraph 18 formula for the Miller or Rose lease[27], options (a) and (b) were not employed. Instead, NMAC's computer system used a market value figure obtained from the NADA computer system, and used that in calculating the early termination liability, see Dep. of Judith Holloway, R. at 9-10. NADA[28] is "one of the book value systems or book value vendors that would supply [NMAC] with information regarding the value of the vehicle," Dep. of Judith Holloway, R. at 10. As this "realized value" figure is taken from the NADA on-line database, it is not necessarily the amount that the car actually fetched when NMAC sold it.

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[27]As noted above, and as will be discussed below, the Roses and Miller did not actually pay to NMAC the amount resulting from the application of the paragraph 18 formula. However, this amount was calculated, at least by the leasing computer system, during the process of the lease termination, and it is to this process that we speak here.

[28]Evidently, the National Automobile Dealers Association.

With respect to the early termination charge as a whole, NMAC believes that the amount derived from the formula helps, on an early termination, to recover to NMAC at least a portion of the difference between the revenue neutral residual and the contract residual, see Dep. of Robin Norris, R. at 141.

d. The Derivation of the Amount Actually Charged to Miller and the Roses

As we have just discussed, the lease provides a detailed formula by which is calculated the "early termination charge" a lessee owes when seeking to terminate a lease before the end of the lease term. However, we earlier noted that the Roses and Miller, upon the early termination of their leases, were not in fact charged an amount resulting from the application of that formula to the figures in their leases. Instead, the Roses and Miller paid, as an early termination charge, the undiscounted amount of their remaining yet-to-be-paid monthly lease payments: in Miller's case this was one payment, and in the Roses' case it was two.

This occurred because when the Roses and Miller sought to terminate their leases early, and the information regarding their leases and the termination was put into NMAC's computer system, the system[29] internally calculated two numbers, (1) the

[29]NMAC's leasing computer system used a program called the "Lease Master Software System" that was developed by the LeMans Group, a software company. The Lease Master system was not unique to NMAC but was also used by other lessors nationwide, including other vehicle manufacturers and banks, see Dep. of Jon (continued...)

charge that would result from the application of the early termination charge formula contained in paragraph 18 of the lease, and (2) the charge that would result if the lessee were to pay the undiscounted value of all remaining monthly lease payments. The computer then chose the lesser of these, and quoted that number as the "early termination" charge, see Dep. of Judith Holloway, R. at 19-21, 24; Dep. of Robin Norris, R. at 154.

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[29](...continued)
Baird, Sept. 17, 1998, R. at 241. This program, which was written in the COBOL computer language, see Dep. of Jon Baird, Sept. 17, 1998, R. at 254, evidently underwent modification as necessary to comport with the language used in the NMAC leases, see Dep. of Jon Baird, Sept. 17, 1998, R. at 240.

B. Procedural History

1. The Original Complaint

In the original Complaint, the plaintiffs brought essentially three claims based on the Consumer Leasing Act. First, they claimed that the language of the early termination clause did not serve adequately to disclose the early termination formula pursuant to Federal Reserve Regulation M, see Compl. ¶¶ 38A, 38B, 38C, and that NMAC's practice of rounding the early termination liability to the next monthly anniversary of the lease represented an overcharge in violation of 15 U.S.C. § 1667b(b), see Compl. ¶ 38D. They also alleged that NMAC used an undisclosed formula to calculate the liability actually charged to early-terminating lessees, see Compl. ¶ 38E.

2. The Ensuing Motion Practice

On November 8, 1999, the parties entered into a stipulation to dismiss without prejudice the first set of claims. The parties stipulated that because the first set of claims was the subject of Judge Shapiro's decision in Applebaum v. Nissan Motor Acceptance Corp., No. 97-7256, 1999 WL 236601 (E.D. Pa., April 21, 1999), which was then on appeal, those claims should be dismissed without prejudice subject to their reassertion following the Court of Appeals's decision in Applebaum.[30] As will be discussed further below, on August 30, 2000 our Court of

[30] Leonard Applebaum was another NMAC lessee who had brought an action based on identical language in his lease. Applebaum's lawyer is the same as Miller's and the Roses'.

Appeals issued its decision in the Applebaum case, reversing the district court and finding that the early termination clause violated Regulation M because it did not disclose the amount of the "residual value," see Applebaum v. Nissan Motor Acceptance Corp., No. 99-1373, 2000 WL 1225805 (3d Cir. Aug. 30, 2000).

Subsequent to the parties' stipulation, NMAC filed a motion to dismiss the remaining two sets of claims pursuant to Fed. R. Civ. P. 12(b)(6). In a February 15, 2000 Memorandum, we dismissed the claims related to the "rounding issue," but let stand the claims that NMAC used an undisclosed formula to calculate early termination liability, see Miller v. Nissan Motor Acceptance Corp., No. 99-4953, 2000 WL 175128 (E.D. Pa. Feb. 15, 2000). Thus, after February 15, 2000, the only claim remaining in this case was that NMAC used an undisclosed formula to compute the actual amount charged for early termination.

We subsequently ordered a schedule for discovery and the filing of motions for summary judgment on this remaining issue. The parties filed cross-motions for summary judgment on that claim, but simultaneous with their opposition to NMAC's motion for summary judgment, the plaintiffs filed a motion to amend their Complaint pursuant to Fed. R. Civ. P. 15(a). By a May 16, 2000 Order, we granted that motion, and the plaintiffs then filed their Amended Complaint. The parties have now filed the instant cross-motions for summary judgment on that Amended Complaint.

3. The Amended Complaint

We must first spell out precisely the allegations made in the Amended Complaint.

In Count I, plaintiffs claim that the language of the NMAC leases violates the disclosure requirements[31] of 15 U.S.C. § 1667 and Federal Reserve Regulation M, 12 C.F.R. § 213. This "disclosure" claim has several distinct parts.

First, in paragraph 77 of the Amended Complaint, plaintiffs allege that the language of the early termination clause fails adequately to disclose the formula used to calculate the early termination charge because the lease does not define the formula's terms. This claim appears to be substantively the same as those asserted in paragraphs 38A, 38B, and 38C of the original Complaint; as noted above, the parties stipulated to dismiss these claims without prejudice on the basis that they were identical to issues on appeal in the Applebaum case, then on appeal to our Court of Appeals. Also as noted above, the Third Circuit has recently issued its opinion in the Applebaum case, see Applebaum v. Nissan Motor Acceptance Corp., No. 99-1373, 2000 WL 1225805 (3d Cir. Aug. 30, 2000), in which it reversed the district court's grant of summary judgment to NMAC, finding that the lease language did not adequately disclose the early

[31] These "disclosure" claims, which allege that the language of the lease itself is defective, are distinct from the "substantive" claims plaintiffs brings, which essentially allege that the calculation of the early termination charge and the amount actually charged are improper under the statute and Regulation. These distinctions will be detailed further below.

termination formula. In the "Analysis" section below, we will discuss further the effect of Applebaum on our disposition of the instant motions.

The second "disclosure" claim brought in Count I of the Amended Complaint is contained in paragraph 78. There, plaintiffs allege that the Consumer Leasing Act and Regulation M require that, in circumstances where the lease assigns to the lessee liability for the difference between the anticipated fair market value of the car at the end of the lease and the actual appraised value of the vehicle, such liability be disclosed in the lease. Plaintiffs contend that the NMAC leases make the lessee liable for this differential but fail to disclose it in the lease.

The third "disclosure" claim, found in paragraph 79 of the Amended Complaint, is that to the extent that NMAC used an undisclosed alternative formula[32] to determine the early termination liability, NMAC failed to disclose this alternative formula in the lease, thereby violating the disclosure requirements of 15 U.S.C. § 1667a(11). This claim is substantively the same as the allegations contained in paragraph 38E of the original Complaint, which survived NMAC's motion to dismiss.

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[32]This allegation evidently stems from NMAC's practice of sometimes charging the early terminating lessee the undiscounted value of the remaining lease payments, if this payment would be less than the charge resulting from the early termination formula contained in the lease.

The next group of claims, found in Count II of the Amended Complaint, are allegations of "substantive" violations of the Consumer Leasing Act and Regulation M. Again, there are several components to this count of the Amended Complaint.

First, in paragraph 81 of the Amended Complaint, plaintiffs contend that the formula for calculating early termination charges that is disclosed in the leases results in charges that are unreasonable in light of the actual harm caused to NMAC by the early termination, in violation of the Consumer Leasing Act. In this paragraph, plaintiffs also contend that the formula contained in the lease shifts to the lessee the risk that the "residual value" assigned to the vehicle is in fact inflated, and that inflation of the "residual value" gives NMAC improper windfall profits if the lease is terminated early.

The second "substantive" claim of violation of the Consumer Leasing Act and Regulation M, made in paragraph 82 of the Amended Complaint, argues that the "alternative formula" NMAC used to assess an early termination charge -- namely, NMAC's practice of sometimes charging the undiscounted value of the remaining lease payments in place of the amount resulting from the lease formula -- itself results in a charge that is unreasonable. Specifically, plaintiffs allege that the alternative formula allows NMAC to collect all the lease payments despite that the lessee did not hold the car for the whole period, and that the alternative formula allows NMAC to collect unearned lease charges.

Next, in Count III of the Amended Complaint, plaintiffs assert claims of common-law unjust enrichment against NMAC. Here, plaintiffs allege that both the lease early termination formula and the alternative formula represent penalties that are unenforceable under the laws governing contractual liquidated damages. In particular, plaintiffs aver that the lease liquidated damage clause results in an improper windfall to NMAC whenever the "residual value" is more than the actual value of the automobile at the end of the lease, and that the alternative formula results in such a windfall whenever it is applied. Moreover, they allege, NMAC deliberately inflates the "residual values" assigned to leased vehicles, and intends by this practice to reap windfalls upon early termination. Thus, say the plaintiffs, NMAC has been unjustly enriched by the collection of unenforceable early termination charges, levied either on the basis of the lease early termination formula or the alternative formula.

Count IV of the Amended Complaint seeks declaratory and injunctive relief. In particular, plaintiffs aver that NMAC has attempted to collect charges levied either pursuant to the lease early termination formula or the alternative formula through the use of collection agencies or the institution of lawsuits against the lessees. Plaintiffs seek a declaration of rights that lessees are not obligated to pay such charges, and an injunction against NMAC from collecting these charges.

Count V of the Amended Complaint seeks damages, both actual and treble, pursuant to the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Con. Stat. Ann. § 201-1 et seq, on the basis that NMAC's conduct constitutes unfair or deceptive acts or practices which create a likelihood of confusion or misunderstanding.

Lastly, Count VI of the Amended Complaint seeks damages pursuant to Article 2A of the Uniform Commercial Code. Specifically, plaintiffs allege that the early termination formula in the lease is a provision for liquidated damages, pursuant to UCC § 2A-504, and that it is unreasonable as written and applied in light of the harm the early termination causes.

II. Analysis[33]

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[33]A summary judgment motion should only be granted if we conclude that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In a motion for summary judgment, the moving party bears the burden of proving that no genuine issue of material fact is in dispute, see Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986), and all evidence must be viewed in the light most favorable to the nonmoving party, see id. at 587. Once the moving party has carried its initial burden, then the nonmoving party "must come forward with 'specific facts showing there is a genuine issue for trial,'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)) (emphasis omitted); see also Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (holding that the nonmoving party must go beyond the pleadings to show that there is a genuine issue for trial).

The mere existence of some evidence in support of the nonmoving party will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). However, we must "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party (continued...)

A. The Consumer Leasing Act and Regulation M

We begin our analysis of the pending motions with a brief discussion of the pertinent statutes and Regulation. The Consumer Leasing Act, codified at 15 U.S.C. § 1667 et seq. is the statute governing the content of vehicle leases.[34] 15 U.S.C. § 1667a addresses "consumer lease disclosures", and provides, in pertinent part, that

> Each lessor shall give a lessee prior to the consummation of the lease a dated written statement on which the lessor and lessee are identified setting out accurately and in a clear and conspicuous manner the following information with respect to that lease, as applicable:
> . . . .
> (4) The amount of other charges payable by the lessee not included in the periodic payments, a description of the charges and that the lessee shall be liable for the differential, if any, between the anticipated fair market value of the leased property and its appraised actual value at the termination of the lease, if the lessee has such liability;
> . . . .
> (11) A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the term and the amount or method of determining any penalty or other charge for delinquency, default, late payments, or early termination.

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[33](...continued)
opposing the motion." Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995).

[34]For a discussion of the background of the Consumer Leasing Act, see Applebaum, 2000 WL 1225805 at *2.

15 U.S.C. § 1667b discusses "Lessee's liability on expiration or termination of lease," and § 1667b(b) provides that:

> Penalties or other charges for delinquency, default, or early termination may be specified in the lease but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the delinquency, default, or early termination, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.

The Federal Reserve Board issues rules implementing the Consumer Leasing Act pursuant to 15 U.S.C. §§ 1604 and 1667f. Federal Reserve Regulation M, 12 C.F.R. § 213, is that regulation.[35] Regulation M contains, inter alia, requirements for various disclosures to be made in leases, including (1) "[a] statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the lease term and the amount or method of determining the amount of any penalty or other charge for early termination," 12 C.F.R. § 213.4(g)(12), and (2) "[a] statement that the lessee shall be liable for the difference between the estimated value of the property and its realized value at early termination or the end of the lease term, if such liability exists," 12 C.F.R. § 213(g)(13). Such disclosures must be made "clearly, conspicuously, in meaningful

[35] Regulation M was significantly amended in 1996. The parties agree that it is the pre-amendment Regulation that applies to the Rose and Miller leases. Therefore, our citations to Regulation M are, unless otherwise noted, from the 1995 Code of Federal Regulations.

sequence, and in accordance with the further requirements of [§ 213.4]." 12 C.F.R. § 213.4(a)(1).

With this background, we now move to discuss the parties' motions for summary judgment. For clarity, we will proceed to discuss each allegation in the Amended Complaint, as outlined in the preceding section, in turn.

B. Plaintiffs' Disclosure Claims

1. Allegations in Paragraph 77 of the Amended Complaint Regarding Insufficient Disclosure of the Early Termination Formula

Plaintiffs allege in paragraph 77 of the Amended Complaint that the provisions of lease paragraph 18 fail adequately to disclose the formula used to calculate the early termination liability. As noted above, this claim appears in substance to be the same as that brought in paragraphs 38A, 38B, and 38C of the original Complaint. These portions of the original Complaint were dismissed without prejudice, "subject to re-filing following the issuance of the Third Circuit's final decision (including final disposition of any motion for rehearing) in Applebaum," Stipulation and Order Regarding Resp. to Compl. at ¶ 3 (docket number 4). The stipulation further mandated that the statute of limitations on that disclosure claim was tolled for thirty days after the Court of Appeals's decision in Applebaum, and that if the claim were re-filed within thirty days of the Applebaum decision it would be deemed to have been filed as of the date of the filing of the original Complaint, see

Stipulation and Order Regarding Resp. to Compl. at 3 (docket number 4).

As noted above, our Court of Appeals issued its opinion in Applebaum on August 30, 2000, which was after the parties had filed their motions for summary judgment, but before responses were due. In its motion for summary judgment, NMAC states it would not move for summary judgment on the paragraph 18 formula disclosure claim in light of the Stipulation. In their response, filed after Applebaum was decided, plaintiffs note that they are entitled to summary judgment on this claim, since Applebaum "conclusively resolved" that NMAC had failed to disclose the early termination formula in the lease, see Pls.' Mem. of Law in Opp'n to Mot. for Summ. J. at 17. As plaintiffs' own motion for summary judgment was filed before Applebaum was issued, that motion does not itself seek summary judgment on this disclosure claim.[36]

We first note that though more than thirty days has passed since the Applebaum decision, the plaintiffs have not explicitly re-filed their formula disclosure claims pursuant to

[36]It appears from the language of the plaintiffs' brief that they take the position that, because the Court of Appeals found that NMAC had violated the disclosure requirements of the CLA and Regulation M, we should grant summary judgment on the whole of Count I, which alleges several disclosure claims including the issue specifically addressed in Applebaum. We cannot agree with this position, as each of the several claims within Count I, which we have above discussed paragraph by paragraph, really represent separate legal claims and must thus be addressed separately.

the Stipulation.[37] However, plaintiffs did file, prior to August 30, their Amended Complaint, which itself raises again, and in slightly different form, the issues that were before the panel in Applebaum. As the defendants have not moved for dismissal of or judgment on these claims, the claims therefore are still "alive" before us, and therefore they appear to have been constructively "re-filed" pursuant to the Stipulation.

This notwithstanding, it is still the case that neither party has briefed the disposition of these formula disclosure claims. Despite Applebaum's clear holding that NMAC failed to make proper disclosure with respect to the formula for early termination, we are loath to grant judgment to the plaintiffs on these allegations without at least a formal motion from them seeking such a measure. To the extent that one sentence in the plaintiffs' response to NMAC's motion states that summary judgment should be granted to plaintiffs, we will deny that "motion" without prejudice to its reassertion in a more formal manner.

Irrespective of this finding, however, it makes sense here briefly to discuss the Applebaum case and its holding, since several of the other issues that the parties raise are related to those Applebaum considered. The parties also make use of the Applebaum decision in some of their arguments.

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[37] We do not now know if either party has requested either panel rehearing or rehearing *en banc*.

As mentioned above, Leonard Applebaum leased a car from NMAC, and his lease contained the same language pertaining to the early termination formula as is contained in paragraph 18 of the Rose and Miller leases. He sued NMAC, alleging that the language of the early termination formula was indecipherable and that the lease did not define some of the terms used, in violation of the disclosure requirements of the CLA and Regulation M, see Applebaum, 2000 WL 1225805 at *2. The District Court granted summary judgment to NMAC, concluding that the formula need not be simple enough that the consumer could perform the calculation, that the "constant yield method" did not need to be explained, and that the "residual value" did not need to be disclosed.

On appeal, the Court of Appeals reversed. The panel focused on the question of whether the method of determining the early termination charge was "clearly" disclosed, see Applebaum, 2000 WL 1225805 at *4. With respect to the meaning of "clearly", the panel looked to the Federal Reserve Board's Official Staff Commentary to Regulation M and found that the disclosure must be in a "reasonably understandable form", showing that "clear" goes not just to visual appearance, but to meaning, see Applebaum, 2000 WL 1225805 at *5. On the other hand, the panel found that the disclosure still need not be understandable to the average consumer, but that instead whether the disclosure is "understandable" must be evaluated in light of the complexity of the method described, see Applebaum, 2000 WL 1225805 at *5.

The panel then looked at the language of the early termination charge formula and determined that it would be "reasonably understandable" if the specific terms used in the lease were themselves "reasonably understandable." The terms at issue were: "constant yield method," "rate implicit in the lease," and "residual value." The panel found that "constant yield method" was a technical term with a specified meaning that need not be further spelled out in the lease, see Applebaum, 2000 WL 1225805 at *6. The panel also held that "rate implicit in the lease" need not be disclosed, as it was surplusage, since "NMAC would have been required to discount at the rate implicit in the lease even in the absence of such a reference," Applebaum, 2000 WL 1225805 at *6. Moreover, the panel noted, the Federal Reserve Board had, after much consideration, not required in the regulations that the lease rate be disclosed, see id.

With respect to "residual value"[38], however, the panel found that the residual value must be disclosed. The panel first noted that "residual value" had an established meaning in the leasing field, and the Federal Reserve Board had defined it as, "The end-of-term value of the vehicle established at the beginning of the lease and used in calculating [the] base monthly payment . . . ." Applebaum, 2000 WL 1225805 at *7 (quoting Federal Reserve Board, Leasing Language (last updated Mar. 29,

[38]The discussion here was only associated with the contract residual value -- the residual value actually used in the lease calculations -- and did not mention the revenue neutral residual values discussed above.

2000) <http://www.federalreserve.gov/pubs/leasing/glossary.htm>). The panel also noted that the current regulations define "residual value" as "the value of the leased property at the end of the lease term, as estimated or assigned at consummation by the lessor, used in calculating the base periodic payment." Applebaum, 2000 WL 1225805 at *7 (quoting 12 C.F.R. § 213.2(n) (2000)).

The panel found that NMAC was required to disclose the residual value because without knowing that number, no one, even someone who knew how to use the constant yield method and who could calculate the rate implicit in the lease[39], would be able to calculate the early termination charge. Thus, because the early termination clause failed to reveal an "otherwise unknowable variable", it was not "reasonably understandable." Applebaum, 2000 WL 1225805 at *7.

NMAC had argued, with respect to the disclosure of the residual value, that the 1995 version of Regulation M explicitly required that the residual value be disclosed for open-end leases, see 12 C.F.R. § 213.4(g)(15), but not for closed-end leases like that which Applebaum (and, here, Miller and the Roses) had. Therefore, NMAC concluded, the court should not require NMAC to do what the Board had declined to require. The panel rejected this argument. The panel noted that because an

[39]As discussed above, the contract residual value itself is one component used in calculating the rate implicit in the lease.

open-end lease is by its very nature one in which the lessee's liability at the end of the lease term is based upon the difference between the residual value of the leased property and the realized value, the Board had a "strong reason" to require the disclosure of that value for open-end leases, see Applebaum, 2000 WL 1225805 at *8[40]. However, "lessors need not, and often do not, use the concept of residual value in closed-end leases," and therefore the panel could not interpret the Board's failure to require such disclosure as a considered decision that disclosure is not necessary to make a closed-end lease understandable in all cases, Applebaum, 2000 WL 1225805 at *8. The panel concluded that because "NMAC constructed its early termination provision in such a manner as to make residual value an essential component of the calculation," NMAC was required to disclose it, Applebaum, 2000 WL 1225805 at *8.

Given the Court of Appeals's decision in Applebaum, we will eschew any further analysis of the claims in paragraph 77 of the Amended Complaint and move on to consider plaintiffs' further claims.

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[40]Conversely, the panel noted in an earlier footnote that the Board defines a closed-end lease as one "in which [the lessee is] not responsible for the difference if the actual value of the vehicle at the scheduled end of the lease is less than the residual value," although the lessee "may be responsible for excess wear and excess mileage charges and for other lease requirements," Applebaum, 2000 WL 1225805 at *1 n.1 (quoting Federal Reserve Board, Leasing Language (last updated Mar. 29, 2000) <http://www.federalreserve.gov/pubs/leasing/glossary.htm>).

2. Allegations in Paragraph 78 of the Amended Complaint Regarding Failure to Disclose the Lessee's Liability for the Difference Between Anticipated and Actual Fair Market Value

In paragraph 78 of the Amended Complaint, plaintiffs allege that NMAC violated the CLA and Regulation M because it failed to disclose to the lessees that they would be liable for the difference between the anticipated fair market value and the actual fair market value at the end of the lease.

Plaintiffs base this claim on 15 U.S.C. § 1667a(4), which, as quoted above, requires that the lessor disclose that the lessee will be liable for the differential between the anticipated fair market value of the leased property and its appraised actual value at the termination of the lease, if indeed the lessee has such liability.

NMAC moves for summary judgment on this claim, arguing that lessees who held their cars until the end of the lease term were not liable for such a differential. NMAC also mentions that, to the extent that early terminators could be liable for such a differential under the paragraph 18 early termination formula, the lessees' liability for the differential was adequately disclosed.

Plaintiffs respond that just as under Applebaum the early termination formula could not be said to be "disclosed" without disclosure of the amount of the "residual value," so too the differential between the estimated value of the leased property and the actual fair market value cannot be said to have been disclosed unless the amount of the residual value is disclosed, since the residual value is the "anticipated value". Thus, NMAC's failure to disclose the amount of the residual value should deny summary judgment to NMAC on this count on the rationale used in Applebaum.

On examination, we find that the logic of Applebaum controls the result here, and we will grant summary judgment[41] to the plaintiff on this claim.

We begin with the text of the provision at issue. Section 1667a(4) requires "clear and conspicuous" disclosure of the fact "that the lessee shall be liable for the differential, if any, between the anticipated fair market value of the leased property and its appraised actual value at the termination of the lease, if the lessee has such liability." We observe initially that the Miller and Rose leases did indeed, in some circumstances, ascribe such liability to the lessees. As NMAC admits, a lessee terminating early was liable, pursuant to the paragraph 18 formula, for the difference between the discounted contract residual value, which stands for the "anticipated fair market value", and the realized value, which was the "appraised actual value".[42] We therefore conclude that disclosure of

[41]Construing plaintiff's opposition as a cross-motion for summary judgment as to this claim.

[42]As discussed exhaustively above, the early termination formula also included the discounted value of remaining monthly payments, but the presence of this additional term in the equation does not take away the fact that the lessee (continued...)

Miller's and the Roses' liability for the difference was required by § 1667a.

The next question is whether that disclosure was accomplished by the language of the lease. As NMAC points out, the existence of this liability is suggested by the language of the formula in paragraph 18: "all monthly lease payments, which . . . are not yet due <u>and the residual value of the Vehicle</u> are discounted to present value . . . . <u>This amount is then reduced by the Realized Value . . . which you receive for the Vehicle</u>." Rose Lease, Ex. Rose-2, R. at 327, Miller Lease, Ex. Miller-2, R. at 362 (emphasis added). We have no problem concluding that the fact of the liability for the differential is disclosed. But the <u>Applebaum</u> opinion shows us that this is not enough. The <u>Applebaum</u> panel held that the "clear and conspicuous" disclosure must be "reasonably understandable," <u>Applebaum</u>, 2000 WL 1225805 at *5, and, moreover, the panel also held that the early termination formula was not "reasonably understandable" because, in the absence of a disclosed amount for the "residual value," no one would be able to calculate the liability.

It is equally true that without a disclosed amount for the residual value, no one could calculate the amount of the residual value/realized value differential. Paragraph 18, which

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[42](...continued) will have to pay at least the difference between the contract residual value and the realized value. We similarly cannot find that the presence of discounting in the formula takes this lessee liability outside the purview of § 1667a.

catalogues three possible ways the "realized value" might be calculated, makes clear that the "realized value" is indeed the market value of the vehicle. Any lessee, knowing that, could determine to a reasonable approximation the amount of the "realized value" by engaging an appraiser or by consulting various references. However, this information would be useless in calculating the differential liability without knowledge of the amount of the residual value. The same logic that drove the Applebaum decision thus drives us here. The disclosure of the fact of the differential liability is not "clear and conspicuous," as required by § 1667a, without disclosure of the amount of the residual value.

It appears that NMAC's argument may be precisely that the only thing the statute required is a bare disclosure of the fact of differential liability -- which, as noted above, the lease language does disclose -- but this is an untenable position. First of all, the context of § 1667a(4) shows that it is concerned with amounts of charges, and not just their existence.[43] Second, while a cursory examination of the bare language of § 1667a(11) similarly suggests that a mere disclosure of the early termination formula would suffice, Applebaum shows that it will not.

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[43]That subparagraph begins, "The amount of other charges payable by the lessee not included in the periodic payments . . . ."

We therefore find that plaintiffs are entitled to summary judgment with respect to disclosure of the differential charge.[44]

[44]Although we have found that NMAC has failed to meet the requirements of 15 U.S.C. § 1667a(4) with respect to disclosure of lessee liability for the residual value/realized value differential, we have done so on the assumption that it is not subsumed into the claims, already resolved in Applebaum, regarding the early termination liability formula. As discussed above, the residual value/realized value differential is merely one part of the larger early termination liability; consequently, the § 1667a(4) liability is in some senses a subset of the Applebaum § 1667a(11) liability. Moreover, even if the § 1667a(4) liability is in some ways independent of the § 1667a(11) liability, it is not clear that both violations could support independent claims for damages pursuant to 15 U.S.C. § 1640. We will leave consideration of this question for another day.

3. Allegations in Paragraph 79 of the Amended Complaint Regarding Failure to Disclose the "Alternative Formula"[45] Used to Calculate the Roses' and Miller's Early Termination Charges

In paragraph 79 of the Amended Complaint, plaintiffs claim that NMAC violated the disclosure provisions of the Consumer Leasing Act by calculating the actual early termination charge levied on Miller and the Roses not by the formula contained in paragraph 18 of the leases, but rather by summing the outstanding monthly payments still due on the lease. Both sides have moved for summary judgment as to this claim.[46]

The plaintiffs offer two sets of arguments. They assert that Applebaum requires that we grant them summary judgment on this claim, since if the failure to disclose the amount of the contract residual value were enough to render paragraph 18 an insufficient disclosure of the early termination charge, then the use of a formula not even hinted at in the lease must similarly be insufficient. Secondly, plaintiffs contend

[45]As will be discussed below, it is undisputed that the actual early termination fee Miller and the Roses paid was not calculated by the paragraph 18 formula, but rather was the sum of the outstanding monthly payments. The plaintiffs term this use of the sum of the outstanding monthly payments the "alternative formula". Though NMAC appears to reject this as a characterization we find that it is a useful shorthand, and will use it.

[46]As discussed above, the parties submitted cross-motions for summary judgment on this issue before the Amended Complaint was filed. In their present briefs, the parties have incorporated those earlier briefs, to varying extents, with respect to this issue. When citing to those earlier briefs, we will use the date of filing in order to distinguish them from our instant cross-motions.

that even if the alternative formula resulted in a lower charge to the Roses and Miller than the use of the paragraph 18 formula would have, the failure to disclose the formula actually used still constitutes a technical violation of the Consumer Leasing Act.

NMAC also moves for summary judgment on this claim. It first argues that the amount charged to the Roses and to Miller was not in fact an early termination charge, but was instead was their "unsatisfied contract obligation". NMAC contends that the amount of that charge was plainly ascertainable from what was disclosed in the lease and known to the lessee. NMAC argues that the lessees are charged the lesser of the paragraph 18 early termination formula result and the remaining payments on the lease based on the principle that lessees should not pay more than the maximum payment amount set forth in the contract. That is, NMAC's "benefit of the bargain" for the leases is either the full contract price (the sum of all the monthly payments for the entire term of the lease) or, in the case of early termination, all monthly payments made before the early termination plus the early termination charge calculated by the paragraph 18 formula, _see_ Mem. of Law in Supp. of Mot. for Summ. J., Apr. 6, 2000 at 8. Thus, NMAC's practice of charging the remaining payments due when that amount was less than the early termination charge serves to limit the total amount paid by the lessee to the full contract price, and such a practice cannot be a violation of the CLA or Regulation M.

Moreover, NMAC contends, even if NMAC always quoted the paragraph 18 formula charge to lessees seeking to terminate early, these lessees would still be able to figure out for themselves, from the information contained on the lease, that it would be cheaper to pay the remaining monthly payments rather than the quoted paragraph 18 amount.[47]

As our Court of Appeals noted in Applebaum, see Applebaum, 2000 WL 1225805 at *2, the CLA was, by its own terms, intended "to assure a meaningful disclosure of the terms of leases of personal property for personal, family, or household purposes so as to enable the lessee to compare more readily the various lease terms available to him, limit balloon payments in consumer leasing, enable comparison of lease terms with credit terms where appropriate, and to assure meaningful and accurate disclosures of lease terms in advertisements," 15 U.S.C. § 1601(b). Moreover, "[t]he Senate Report accompanying the CLA stated that '[t]he purpose of the legislation is to provide consumers with meaningful information about the component and aggregate costs of consumer leases, so that they can make better informed choices between leases, and between leases and credit sales.' See S. Rep. No. 94-590 (1976), reprinted in 1976 U.S.C.C.A.N. 431, 432," Applebaum, 2000 WL 1225805 at *2.

[47]NMAC argues that it would be absurd to force lessees to choose between (1) paying an early termination fee higher than their remaining payments, or (2) retaining the car when they no longer wish to do so. Given such a choice, NMAC claims, it makes perfect sense, and is entirely proper, to allow the lessees to give up the car while paying the remaining monthly payments.

We note that the CLA was enacted as part of the Truth in Lending Act (TILA), and "TILA is a remedial statute and should be construed liberally in favor of the consumer," Ramadan v. Chase Manhattan Corp., 156 F.3d 499, 502 (3d Cir. 1998). Also, "TILA achieves its remedial goals by a system of strict liability in favor of the consumers when mandated disclosures have not been made," Smith v. Fidelity Consumer Discount Co., 898 F.2d 896, 898 (3d Cir. 1990).[48]

The parties have not cited to us, nor have we been able to locate, any cases from this Circuit discussing the alleged use of an undisclosed formula to calculate early termination liability. Plaintiffs rely on two cases from the Seventh Circuit, Channell v. Citicorp Nat'l Servs., Inc., 89 F.3d 379 (7th Cir. 1996) and Highsmith v. Chrysler Credit Corp., 18 F.3d 434 (7th Cir. 1994).

In Highsmith, a panel of the Seventh Circuit considered a challenge[49] by consumers to early termination charges an automobile lessor levied, and among the many issues it canvassed was the question of the propriety, under 15 U.S.C. § 1667a(11), of the lessor's disclosure of its early termination formula. The plaintiff contended that the actual charge the lessor levied was

[48]Though Smith dealt with lending, and not leasing, disclosures, the Smith panel cited in support of the quoted proposition 15 U.S.C. § 1640(a), the same damages provision that obtains for violation of the CLA, see 15 U.S.C. § 1667d.

[49]The case was appealed after the district court had dismissed the plaintiffs' claims.

the amount obtained through the disclosed calculation minus an unearned finance charges, see Highsmith, 18 F.3d at 438. The panel held that "failing to disclose any portion of the formula that a lessor actually uses for calculating the early termination charge, [sic] will give rise to a technical violation of the disclosure provision found in 15 U.S.C. § 1667a(11) and Regulation M. Therefore, by claiming that [the lessor] provides an unearned finance charge reduction, but does not disclose that as part of their formula, [the plaintiff] has presented a claim upon which relief can be granted . . . ." Highsmith, 18 F.3d at 439.

The panel went on to reject several of the lessor's arguments to the contrary. The lessor had contended that because the ultimate charge to the consumer was less than the disclosed charge, there was no harm to the consumer. The panel rejected this, noting that any inaccuracy -- whether too high or too low -- of the disclosed formula harmed consumers by impeding their ability to make a rational decision regarding termination, see Highsmith, 18 F.3d at 439. The lessor also contended that its reduction of the penalty was an effort to treat the lessee more favorably than the lease provided, and that doing so should not constitute a violation of the disclosure provisions. The panel also rejected this argument, finding that while a lessor always has the ability to reduce charges or eschew them altogether if the circumstances of a particular case demand it, a lessor may not "maintain a practice of always calculating the early termination charge according to a certain formula while disclosing only a portion of that formula in the lease." Highsmith, 18 F.3d at 440.

Channell considered an action by a class of consumers against an automobile lessor claiming, inter alia, that the lessor used a method other than that disclosed to calculate, at least in some cases, the early termination charge, see Channell, 89 F.3d at 381. The district court had granted judgment to the plaintiff class on the disclosure claim, finding that there was an undisputed disparity between the method disclosed and the method applied[50], and had assessed a $100 statutory penalty per lease on the lessor, see Channell, 89 F.3d at 383. The panel cited to Highsmith and affirmed the District Court's decision. Noting that "[Highsmith] holds that a disclosure is deficient if the lessor does something else, even if that something else is more favorable to the lessee. Lessors must disclose what they do in fact. Practical as well as formal considerations support that conclusion." Channell, 89 F.3d at 383.

On the undisputed facts before us, we will grant summary judgment to the plaintiffs on this claim. Most fundamentally, this is based upon the facts that (1) the Roses and Miller did terminate their leases early, and (2) the amount

[50]In particular, the lessor had disclosed that it would use "the Rule of 78s" to calculate unearned finance charges, but in fact it used "the actuarial method (an exact accounting)" to determine unearned interest, Channell, 89 F.3d at 383.

they were charged was calculated in a way not disclosed in the leases.

With respect to the first fact, NMAC's records show that the Roses terminated their lease on March 24, 1999,[51] see Ex. Holloway-2 at 30, R. at 87; Dep. of Judith Holloway, R. at 28 (noting that the entry in the "TERM/PAY" field of the computer report means that the lease was terminated early), while the Roses' lease shows a term extending until June 25, 1999 (thirty-nine months after the lease was initiated). Similarly, Miller turned in his vehicle on November 16, 1999, see Ex. Holloway-2 at 38, R. at 95 (showing "Ground Date" of "11/16/99"); Dep. of Judith Holloway, R. at 15 (the "grounded date" is the date the car was physically returned to the dealer or an authorized agent), while his lease had a term extending until December 26, 1999 (thirty-six months after the lease was initiated).

With respect to the second fact, NMAC does not dispute that Miller and the Roses were not charged a sum resulting from the application of the paragraph 18 formula, but instead were required to pay the remaining monthly payments due under the leases, see NMAC's Mem. of Law in Supp. of Mot. for Summ. J., Apr. 6, 2000, at 4. Similarly, there is no dispute that NMAC charged this number as a result of its practice of calculating

[51] In our discussion of the factual background, we noted that the Roses had turned in their car on March 23, 1999; the one-day difference between the computer system record and the turn-in date is not material.

both the paragraph 18 sum and the remaining payments sum and to charge the lessee the smaller amount, see NMAC's Mem. of Law in Supp. of Mot. for Summ. J., Apr. 6, 2000, at 9. We observe -- and NMAC does not contend otherwise -- that there is no language in paragraph 18 or anywhere else in the lease that tells the lessee that some early terminating lessees will be charged the sum of their remaining payments.

Thus, on these basic propositions, NMAC failed to disclose in the leases the early termination formula that it actually used in calculating early termination liability, in violation of the Consumer Leasing Act and Regulation M. As Channell and Highsmith held, the question here is not really about the content of what NMAC did, but instead whether the lease disclosed what NMAC did. It does not matter, then, that NMAC charged the an amount less than what the paragraph 18 formula would require. Similarly, and as we will detail below, it also does not matter that the amount actually charged to the lessee could be derived from other disclosures in the lease. The question here is whether the lease disclosed to the lessee, in a "reasonably understandable" fashion, that the lessees would under some circumstances be charged the remaining payments due under the lease if the lease was terminated early. The lease does not do any such thing, and thus the plaintiffs must win summary judgment on this claim.

NMAC's arguments to the contrary are unavailing.

First, NMAC asserts that what the Roses and Miller were charged was simply not an early termination charge. NMAC's position here is that the amount calculated under the paragraph 18 formula is an "early termination charge", while the amount that these lessees were in fact charged (being the sum of the remaining monthly payments) is not properly termed an "early termination charge" and that the disclosure requirements of 15 U.S.C. § 1667a(11) are thus inapplicable. We find this argument semantic at most. The Roses and Miller terminated their leases early. After they did so, NMAC required a payment as a result of the early termination.[52] This payment, by the timing of and motivation for its imposition, can only be regarded as a "penalty or other charge for . . . early termination" covered by the language of § 1667a(11). That NMAC considered the payment to be something other than the early termination charge[53], or that it

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[52]That is, a charge distinct from other end-of-lease charges such as excess mileage charges, damage charges, or the disposition fee charged at all lease terminations pursuant to paragraph 17 of the lease.

[53]Another facet of NMAC's argument here seems to be that the lessees, in paying the remaining monthly payments, were merely paying those amounts they would have paid had they not terminated the lease early, and thus those sums cannot be thought to be early termination charges. We find this equally unpersuasive. Most significantly, the question here is not what payments the lessees would have had to make if they didn't terminate early, because the fact is that they <u>did</u> terminate early. Thus, the fact that the charge levied upon them was equal to, or calculated based upon, what they would have otherwise had to pay does not make the charge any less associated with the early termination.

Also, we note from the Rose invoice, Ex. Rose-4, R. at 331, that although the termination charge is titled "Unsatisfied

(continued...)

calls the payment something else, cannot serve to remove this charge from the disclosure requirements of the statute[54].

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[53](...continued) Contract Obligation," it is invoiced as a lump sum rather than as separate monthly payments. Thus, it is not as if an early terminator was merely required to continue paying the lease month-by-month as if the termination had not happened, but instead was charged a total sum after the early termination. Admittedly, this is difficult to ascertain from the Rose invoice, which was not issued until September 1999, after the lease term was over, but there is no suggestion here from NMAC that its "remaining payments" charge is levied in anything but a one-time charge, and it is undisputed that it is quoted to the lessee as a single lump-sum charge.

[54]Similarly, with respect to the Miller lease, NMAC argues the termination was not an "early termination" because Miller did not consider it to be one, see NMAC's Mem. of Law in Supp. of Mot. for Summ. J. at 12 (citing Dep. of Brian Miller, R. at 342). We first note that it is unclear to us whether it matters what the lessee thought he was doing, as opposed to what the effect of his acts were. In any event, although Miller at one point in his deposition does say that he didn't think it was an early termination, when NMAC's counsel followed up by asking, "So you -- and you did not even consider that an early termination?", Miller responded with "I guess, yeah, technically, I guess it was." Dep. of Brian Miller, R. at 342. Moreover, the reason that he didn't think it was an early termination is that he was required to pay the remaining monthly payment on the lease, and so the very form of the early termination charge at issue here motivated Miller's belief. It would be odd indeed, then, to let this impression, created by NMAC's use of an undisclosed formula, to foreclose the conclusion that the formula was not disclosed.

We briefly address here NMAC's contentions with respect to the manner in which the Roses and Miller terminated their leases. NMAC notes, and it appears undisputed, that neither lessee gave thirty days' written notice of their intent to early terminate. NMAC also notes that the Roses turned their car into a Mitsubishi dealership, though the plaintiffs rejoin that this dealership was affiliated with a Nissan dealership at the same site. NMAC's position would appear to be that since it permitted the lessees to terminate outside the mandates of paragraph 18, NMAC itself was permitted to deviate from paragraph 18 in assessing a charge. While we can see that these failures might mean that NMAC was not obligated to allow the lessees to terminate early when they sought to, we cannot see that these (continued...)

NMAC also argues that there is no disclosure violation here because the amount charged the lessees was the remaining portion of the "Total of Monthly Payments," an amount that was disclosed on the leases. Put another way, NMAC contends that the amount charged was not an undisclosed early termination liability but a very-much disclosed lease payment. While we suppose that there is some logic behind this position, we must reject it as we find it asks too much of the lessee.

As discussed above, our Court of Appeals in Applebaum found that disclosure of the early termination liability must be "reasonably understandable," Applebaum, 2000 WL 1225805 at *5. Here, while the Total of Monthly Payments is disclosed on the lease, there are many steps from reading this figure to understanding that it can, in some circumstances, be a factor in the early termination charge. NMAC maintains that if a consumer were given a quote of the paragraph 18 early termination charge,[55] the consumer would be able to calculate whether the remaining monthly lease payments in fact amounted to a lesser

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[54](...continued) failures on the part of the lessees would permit NMAC to charge any early termination fee it felt the urge to. Alternatively, NMAC's position may be that the lessees' failures to meet the paragraph 18 prerequisites meant that these were not "early terminations." Again, we cannot accept this: the leases had terms, and were ended before those terms expired. These were early terminations.

[55]Of course, one problem with this logic is that the lessees were not given both figures, or a single figure identified as having resulted from the paragraph 18 formula, but instead were given one dollar amount as an early termination quote.

sum. We agree with this as far as it goes, but NMAC goes on to say that having done this calculation, the lessee would know that he had the option of paying this lesser amount.

We cannot agree that this conclusion follows from the disclosure of the Total of Monthly Payments in the lease[56]. There is nothing in the lease to suggest that an early terminator has any option other than what is disclosed in paragraph 18. The fact that the paragraph 18 early termination charge might be higher than the remaining monthly payments would merely go to show that early termination at such a point made little economic sense to the lessee, not to show that the lessee actually had the option of terminating early and paying the lower amount. We cannot find that there has been "reasonably understandable" disclosure just because the latter proposition might seem to make sense, particularly as it would seem to go against the specific early termination language in the contract. Parties are, after all, not prohibited from contracting to terms that may seem to some to run contrary to economic sense.

NMAC similarly argues that it would be absurd to require lessees who actually desired to terminate their leases early to hold their vehicles to the end of the term rather than to allow them to pay their remaining obligation and divest themselves of the cars. NMAC asks if it is "supposed to force

[56]Recalling the Applebaum panel's holding that the disclosure need only be reasonably understandable to someone (perhaps a reasonably intelligent Article III judge), not necessarily the average consumer.

the consumer to keep the car at his or her house simply for the sake of making monthly payments through the remainder of the term?" NMAC's Mem. of Law in Supp. of Mot. for Summ. J., Apr. 6, 2000 at 9. Our response to this question is to note that it is irrelevant. The issue here, again, is not whether the practice of charging the remaining payments made economic sense, or even whether doing otherwise would make no sense. The question is whether the "remaining payments" charge was disclosed in a "reasonably understandable" manner. It was not.[57]

Lastly, NMAC seeks to distinguish Channell and Highsmith. NMAC argues that in both of these cases, the lessor was alleged to have used an early termination formula that differed in its particulars from the formula disclosed in the lease, while in our case NMAC quoted and then charged to the lessees an alternative amount that was the lessees' remaining obligation under the lease. We can find no meaningful difference between these two circumstances: to the extent that the total lease obligation was disclosed, there was nothing in the lease to disclose its relationship to early termination.

NMAC also argues that under the facts of Channell and Highsmith, the lessors in those cases had incentives to use a

[57]We further note that there is nothing in the lease that might allow a lessee who both desired to terminate early and had performed the calculation that NMAC suggests to conclude that he could simply drop the car off at a Nissan dealership and walk away while continuing to make his monthly payments. Among other things, such a lessee would remain responsible for damage to the vehicle during the term of the lease.

formula that resulted in lower charges than the formula presented in the lease because those lessors would have suffered financially from early termination[58] and thus had an incentive to dissuade lessors from early termination. Conversely, NMAC avers, because NMAC ultimately charged the early terminators the exact amount NMAC would have received had the lessees kept the cars to term, it had no incentive to "underdisclose." To the extent that this is true, we observe that there is no mens rea requirement that pertains to the disclosure requirements in § 1667a(11). Irrespective of the existence of clear motives for a failure to disclose, we have found such a failure, and liability under the CLA must follow.

C. Plaintiffs' Substantive[59] Consumer Leasing Act Claims

Having addressed the plaintiffs' claims regarding the disclosure of the early termination charge, we now turn to their allegations under the Consumer Leasing Act regarding the nature or amount of the charge.

As outlined above, plaintiffs maintain that the paragraph 18 formula for calculating the early termination charge is not reasonable under 15 U.S.C. § 1667b because it shifts to the lessee the risk that the residual value of the car is

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[58]That is, the early termination charges would have amounted to less than the remaining rents.

[59]By "substantive" we here mean those claims challenging the amount and nature of the early termination charges, not whether these provisions were properly disclosed in the lease.

inflated and because the formula, when the residual value is in fact inflated, returns windfall profits to NMAC in excess of what it would receive if the lease had been carried to term. Plaintiffs also maintain that the "remaining payments" calculation for the early termination charge is not reasonable because NMAC collects all the payments due despite the fact that it receives the car back several months early, in effect receiving interest on the lessees' payments.

Both the plaintiffs and NMAC have moved for summary judgment on these claims.

1. Standing

NMAC first argues that the plaintiffs have no standing to challenge the reasonableness of the contract early termination charge because they themselves were assessed the sum of the remaining payments, and thus to the extent that they allege that the paragraph 18 early termination charge is unreasonable, the plaintiffs were not harmed by the unreasonableness.

Beyond this assertion, NMAC goes on to counter a hypothetical argument expected from the plaintiffs. NMAC notes that the paragraph 18 value was indeed calculated in the process of the plaintiffs' early termination, but that it was not assessed because the sum of the remaining payments was lower. Based on this, NMAC expected the plaintiffs to argue that the allegedly unreasonable paragraph 18 charge did harm them because had that charge been reasonable, and therefore lower, it would have been lower than the remaining payments and therefore the plaintiffs would have paid an even lower charge than they in fact did.

NMAC argues that even under this anticipated theory, the calculation of the various charges shows that the plaintiffs suffered no injury. To demonstrate this, NMAC recalculated the paragraph 18 formula using the revenue neutral residual values for Miller's and the Roses' cars instead of the contract residual values.[60] The respect to the Roses, NMAC avers that the revenue neutral residual paragraph 18 calculation does indeed lead to an amount less than the remaining payments calculation, but that since the important question is the amount NMAC received, not what the Roses paid, the right comparison number is the sum of the remaining monthly payments less state tax. <u>That</u> number (remaining payments less state tax) is in fact less than the "revenue neutral residual" paragraph 18 amount, and therefore the Roses were not harmed by the calculation of the paragraph 18 amount using the higher contract residual.

Further, NMAC argues that the Roses got the benefit of the lower monthly payments that resulted from the use of the higher residual, and that the amount of these savings was greater than any harm they might have suffered as a result of the

[60]NMAC's papers contain extensive calculations of these numbers and their precise amounts. Because it is the relation among these figures, and not their absolute amount, that matters here, we will not, for the most part, include any particular numbers in our discussion.

paragraph 18 formula. Indeed, NMAC argues, the Roses received a benefit from the use of the higher contract residual.

NMAC makes a similar argument with respect to Miller. Again, NMAC calculated the paragraph 18 formula amount using the revenue neutral residual, and found it to be in excess of the sum of the remaining payments. Therefore, NMAC avers, even if the lower revenue neutral residual had been used, Miller still would have been charged the sum of the remaining payments when he terminated early, and therefore he was not harmed by the use of the higher contract residual. Moreover, NMAC notes that Miller, too, benefitted from the higher contract residual as reflected in his lower monthly payments.

Plaintiffs respond that both the Roses and Miller were injured by the use of the two formulas. Plaintiffs argue first that they clearly have standing to challenge the reasonableness of the sum of the remaining payments early termination charge because that charge was in fact levied on them. With respect to the paragraph 18 formula early termination charge, plaintiffs aver that part of their claim regarding the unreasonableness of the sum of remaining payments charge is the claim that the paragraph 18 formula charge is an improper benchmark. That is, as the plaintiffs were charged the sum of remaining monthly payments because it was less than the paragraph 18 calculation, to the extent the paragraph 18 calculation itself was unreasonably high, the plaintiffs still may have been injured by having to pay an unreasonably high amount.

In support of this, plaintiffs argue that if NMAC had used the ALG residual value[61] for the Roses' car, instead of either the contract residual or the revenue neutral residual, the paragraph 18 calculation would have yielded a negative number, which would have made the early termination charge zero. Similarly, with respect to Miller, plaintiffs aver that a paragraph 18 quote using the ALG residual would have yielded an amount $300 less than the sum of his remaining payments.

Plaintiffs dismiss NMAC's claim that the plaintiffs benefitted from the inflated residual through lower lease payments by observing that this issue is irrelevant to the question of whether the early termination charge is unreasonable, since there is no requirement that the early termination charge include the contract residual as a component.

As our Court of Appeals recently summarized the requirements for Article III constitutional standing,

> (1) the plaintiff must have suffered an injury in fact -- an invasion of a legally protected interest which is (a) concrete and

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[61]In employing the ALG residual, plaintiffs maintain that even the revenue neutral residuals NMAC used were inflated, as they tended to be higher than the ALG figures, see Ex. Holloway-2 at 26-27, R. at 83-84. Plaintiffs complain that NMAC prevented them from taking discovery with respect to this concern, among others, on the basis of a footnote in our Order of July 12, 2000 in which we stated that discovery in this case was properly restricted to those matters associated with Miller's and the Roses' claims, since no class has yet been certified, see Rule 56(f) Decl. of Michael D. Donovan, Esq. (Ex. [A] to Pls.' Opp'n to Mot. for Summ. J.). Plaintiffs aver that more discovery is needed with respect to this issue. To the extent that these concerns are pertinent to our resolution of the instant motions, we discuss them below.

> particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of -- the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Society Hill Towers Owners' Ass'n v. Rendell, 210 F.3d 168, 175-76 (3d Cir. 2000) (quoting Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 484-85 (3d Cir. 1998)).

We also recognize that the fact that this case is a putative class action does not influence our analysis here. No class has been certified, and therefore this action is only between the Roses and Miller, on the one hand, against NMAC on the other, see, e.g., Rolo v. City Invest. Co. Liquidating Trust, 155 F.3d 644, 659 (3d Cir. 1998). Thus, the question before us is not whether some member of the putative class sustained the injury alleged, but rather whether the Roses or Miller sustained it, see Warth v. Seldin, 422 U.S. 490, 502, 95 S. Ct. 2197, 2207 (1975). Of course, the merits of a plaintiff's claim do not enter into the standing calculation, see Warth, 422 U.S. at 500, 95 S. Ct. at 2206.

Here, the parties' dispute on standing centers on the first of the three elements identified in Society Hill Towers, namely, whether the plaintiffs were injured by NMAC's acts. We begin by noting that none of NMAC's arguments go to show how the plaintiffs would not have standing to challenge the reasonableness of the sum of remaining payments early termination charge that they were in fact assessed.[62] It would seem quite clear that to the extent that this charge was unreasonable, the lessees who paid it, including the plaintiffs, suffered injury. We find that the plaintiffs have standing to challenge the legality of the sum of remaining payments charge under the CLA, as they were charged an amount arising from that calculation.

The question of standing with respect to the paragraph 18 formula charge[63] is more involved. It is certainly true that neither Miller nor the Roses paid an early termination charge that was directly calculated using the paragraph 18 formula. However, we cannot ignore the fact that the amount that the Roses and Miller paid did result indirectly from the paragraph 18

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[62]Despite that their arguments on standing are couched so as to apply to all the substantive claims, not just the ones made about the paragraph 18 formula.

[63]We observe that NMAC couches at least part of its standing argument in terms of whether the plaintiffs have standing to prosecute a claim based on the allegedly inflated residuals, see NMAC's Mem. of Law in Supp. of Mot. for Summ. J. at 21. While we agree that the amount of the contract residual is at the heart of the plaintiffs' concerns, the legal question is the reasonableness of the early termination charge -- that is, the CLA has no provisions addressing the reasonableness of the amount of the residual standing alone, and therefore the legal question is whether the charge, which in our case results in part from the use of a particular contract residual, is reasonable. We have therefore analyzed the question of standing with respect to these charges, not with respect to the contract residual per se. We do recognize that the staff commentary to Regulation M does discuss the appropriate derivation of the "estimated value of leased property at termination," Supplement I-CL-1 to Part 213 -- Official Staff Commentary to Regulation M ¶ 4(d)(3), but this discussion does not change the focus of our inquiry from the reasonableness of the charge in general rather than that of one of its components.

calculation. The undisputed evidence shows that NMAC decided what to charge early terminating lessees, including Miller and the Roses, by calculating both the sum of remaining payments charge and the paragraph 18 formula charge, and then selecting the lesser of these actually to levy upon the lessee. Thus, while the dollar figure Miller and the Roses paid was not arrived at using paragraph 18, the amount derived from the paragraph 18 calculation nevertheless helped to determine what they in fact paid. If the paragraph 18 formula had resulted in a number lower than the sum of the remaining payments, then the paragraph 18 formula amount would have been levied on the plaintiffs.

We therefore find that NMAC's position that the paragraph 18 formula was not used to calculate the Roses' and Miller's liability is without merit. Thus, to the extent that the paragraph 18 formula was unreasonable under the CLA, the plaintiffs suffered injury thereby and have standing to pursue their claim.[64]

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[64]As the plaintiffs note, the damages provision of the CLA, 15 U.S.C. § 1640, contemplates that in some cases of CLA violations there will be no actual damages to the plaintiff, and instead provides for statutory damages. We reject what appears to be plaintiffs' more general argument with respect to this section of the statute, which seems to be the proposition that the damages provision does away with the need to show actual injury for standing, see Pls.' Mem. of Law in Opp'n to Mot. for Summ. J. at 30-31. Clearly, a statute's damages provision cannot overcome Article III standing requirements. Instead, § 1640 goes to suggest that not all CLA injuries will be directly calculable in dollars. While this lesser concept would seem to be more easily seen in circumstances alleging, for example, disclosure violations, it may equally apply in a circumstance where the damages are difficult to quantify.

As discussed above, NMAC performs a number of calculations in order to show that the plaintiffs were not injured by the paragraph 18 formula. We cannot agree that these calculations make such a showing. NMAC's calculations purportedly show that even had NMAC used the revenue neutral residuals, the plaintiffs would still have paid the sum of the remaining payments, an amount less than the paragraph 18 amount.[65] However, the significance of these calculations is based upon the assumption that the paragraph 18 formula amount is necessarily reasonable under the CLA if it is calculated using the revenue neutral residual, and there is no basis here for making that assumption. The Amended Complaint alleges that the paragraph 18 formula charge is unreasonable because it shifts to the lessee the risk that the residual value is inflated, see Amended Compl. ¶ 81, a claim which is not uniquely associated with the use of the higher contract residuals. Thus, the fact

[65] With respect to the Roses, this is a very generous reading of the calculations. Recall that NMAC's calculations showed that the "revenue neutral residual" paragraph 18 calculation was in fact less than the sum of the remaining payments calculation, but NMAC made much of the fact that this amount was greater than the sum of the remaining monthly payments without tax. We note, however, that it is undisputed that the Roses and Miller were charged the sum of their remaining payments including tax. With respect to this, NMAC takes the position, without citation to any authority, that it is the sum that NMAC collects, and not the sum the consumers paid, that should be our focus here. This seems to us a strange conclusion to reach with respect to a statute like the CLA that was adopted with a focus on the welfare of consumers rather on that of lessors, see Applebaum, 2000 WL 1225805 at *2. In any event, as discussed in the text, the exact relationship between these sums is not determinative of the plaintiffs' standing.

that a similar outcome would have been reached if NMAC used its revenue neutral residuals cannot mean that the plaintiffs suffered no injury from the formula's use if that formula were unreasonable.[66]

NMAC's argument that the lessees benefitted from the use of the higher contract residual similarly fails. It is undisputed that NMAC's use of a higher residual value in the lease calculations resulted in a lower monthly payment, which, logically, presents a benefit to consumers as compared to a higher lease payment for the same vehicle leased for the same term. We cannot see how this is related to the question of early termination charges. There is no requirement in the CLA that the residual value, either the contract or revenue neutral residual, be a part of the early termination charge formula. Thus, to the extent that the consumer's lower lease payments were "tied" to a higher early termination charge by virtue of the use of the higher contract residual, this situation resulted from NMAC's own decisions in drafting the leases, the very decisions that have been challenged in this action.

Moreover, NMAC appears to assume that the lessees would still have entered the leases if the lease had required the higher monthly payments resulting from the lower revenue neutral residual, but of course this proposition is problematic at

[66]Of course, this fact might go to the question of whether the formula amount was in fact unreasonable, but as noted in the text that is not the question presented in the analysis of standing.

best.[67] The fact that the use of the contract residual led to lower monthly payments is completely divorced from the question of the reasonableness of whether the plaintiffs were injured when an unreasonable charge was levied upon them at early termination, and cannot prevent the plaintiffs from having standing here.

NMAC's standing argument also relies on two cases discussing standing specifically under the CLA, Highsmith v. Chrysler Credit Co., 18 F.3d 434 (7th Cir. 1994) and Kedziora v. Citicorp Nat'l Servs., Inc., 780 F. Supp. 516 (N.D. Ill. 1991). Neither of these cases leads us to conclude that the plaintiffs here have no standing.

In Highsmith, the panel found that a plaintiff had no standing to challenge an early termination provision because he had not terminated his lease early "and more damaging to his case, he has not even alleged that he now has, or will ever have, any desire whatsoever to terminate his lease," Highsmith, 18 F.3d at 437. Clearly, this is not comparable to our case, where there is no dispute that the plaintiffs in fact terminated early.

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[67]That is, in order to calculate the "benefit" to the lessees, NMAC compares the lease payments resulting from the contract residual -- those that the plaintiffs actually paid -- to those that would have resulted had NMAC used the revenue neutral residual to calculate monthly payments. As it turns out, the revenue neutral residual monthly payments are about $50 per month higher than those the plaintiffs faced, see Ex. A, B, E & F to Aff. of Mark Hoover, R. at 462-63, 466-67 (showing calculations of the different lease payments). However, for this difference to be termed a "benefit" requires us to assume that but for NMAC's decision to use the higher contract residual, the plaintiffs would have paid the $50 higher monthly payment. Given the presence of other car manufacturers and car dealers in the marketplace, such an assumption would be unwarranted.

In Kedziora, the District Court found that the plaintiffs had no standing to litigate a "reasonableness" claim under 15 U.S.C. § 1667b(b) with respect to a lease provision because that provision did not figure into the calculation of the liability actually charged to the plaintiff, see Kedriora, 780 F. Supp. at 523. Here again, we face a different situation where, as discussed above, the sum of remaining payments and the paragraph 18 formula were both used -- either directly or indirectly -- in calculating the liability charged to the plaintiffs.

2. Statute of Limitations

NMAC argues that the Roses' substantive claims under the Consumer Leasing Act that were first asserted in the Amended Complaint were untimely and that NMAC should thus be granted judgment with respect to those claims.

15 U.S.C. § 1667d(c) provides in part that "actions alleging a failure to disclose or otherwise comply with the requirements of this part shall be brought within one year of the termination of the lease agreement." As discussed above, the Roses terminated their lease on March 23, 1999, and the initial Complaint in this matter was filed on October 6, 1999. NMAC makes no statute of limitations argument with respect to the allegations in the original Complaint, as it was filed within one year of the Roses' lease termination. On the other hand, the Amended Complaint, which contained for the first time the

"substantive" CLA allegations, was filed on May 24, 2000, more than a year after the Roses terminated their lease. Therefore, NMAC avers, these claims[68] were untimely raised and as such are barred.

The crucial question here is whether the claims first brought in the Amended Complaint "relate back" to the date of the initial Complaint pursuant to Fed. R. Civ. P. 15(c), which states, in part, that:

> An amendment of a pleading relates back to the date of the original pleading when:
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action; or
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. . . .

Here, there is nothing in § 1667d(c) to suggest that the CLA contains a separate relation back provision. Instead, the question is whether the new allegations brought in the Amended Complaint fit within the ambit of Rule 15(c)(2), that is, whether the new substantive CLA allegations arose out the "conduct, transaction, or occurrence set forth" in the initial Complaint.

According to a leading treatise,

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[68]The statute of limitations argument is placed in NMAC's brief as a subsection of its arguments with respect to the substantive claims. This notwithstanding, NMAC also appears to allege in one sentence of its argument that its statute of limitations claims go to the disclosure allegations brought in the Amended Complaint as well. However, as NMAC's statute of limitations arguments go solely to the substantive allegations, and not to the disclosure allegations, we will consider them only as to the substantive allegations.

> the standard for determining whether amendments qualify under Rule 15(c) is not simply an identity of transaction test[69]; although not expressly mentioned in the rule, the courts also inquire into whether the opposing party has been put on notice regarding the claim or defense raised by the amended pleading. Only if the original pleading has performed that function, which typically will be the case if the letter of the test set forth in Rule 15(c) is satisfied, will the amendment be allowed to relate back to prevent the running of the limitations period in the interim from barring the claim or defense.

6A Charles Alan Wright et al. Federal Practice & Procedure § 1497 at 85-86 (2d ed. 1990) (hereinafter "Federal Practice & Procedure"). With respect to this notice, we are to

> determine whether the adverse party, viewed as a reasonably prudent person, ought to have been able to anticipate or should have expected that the character of the originally pleaded claim might be altered or that other aspects of the conduct, transaction, or occurrence set forth in the original pleading might be called into question.

Federal Practice & Procedure § 1497 at 93.

The question before us is therefore whether the new substantive allegations in the Amended Complaint arise from the same transaction as those in the initial Complaint so that NMAC was on notice of the possibility of the new claims. We find that the answer to this must be “yes”, and that the new substantive

[69] Referring to the "common core of operative fact" test used in evaluating compulsory counterclaims and cross-claims, see 6A Charles Alan Wright et al. Federal Practice & Procedure § 1497 at 85 (2d ed. 1990).

claims in the CLA relate back to the filing of the original Complaint.

Most broadly, all the new claims arise from the same vehicle lease transaction as those in the initial Complaint, and NMAC (albeit unintentionally) admits as much, see NMAC's Mem. of Law in Supp. of Mot. for Summ. J. at 23 (referring to the "lease transaction" in the same sentence as its argument that the various claims arise merely from the same "general fact situation"). More than simply this relationship, though, both the claims in the original Complaint and the new substantive claims in the Amended Complaint arise from the early termination of the Roses' lease. There can be no question that the same transaction was involved in all the claims.

As to NMAC's notice, the initial complaint alleged both disclosure and substantive violations of the CLA. Although in our prior Memorandum and Order we dismissed the initial Complaint's substantive claims (which alleged an "overcharge" associated with the fact that Nissan rounded to the next monthly anniversary of the lease in calculating the early termination charge, see Miller, 2000 WL 175128 at *5), NMAC was nonetheless clearly on notice that the plaintiffs were concerned with the reasonableness of its early termination charge, and not merely with disclosure issues. In light of this, the new substantive allegations in Amended Complaint are merely additional ways in which NMAC allegedly violated the same statutory provision. These are hardly novel claims of which NMAC was not aware.

We therefore find that the Roses' new substantive claims under § 1667b(b) raised in the Amended Complaint relate back to the filing date of the original Complaint and are not time-barred.

3. Reasonableness Under 15 U.S.C. § 1667b(b) of the Paragraph 18 Formula Early Termination Charge

In paragraph 81 of the Amended Complaint, the plaintiffs allege that the early termination charge derived from the paragraph 18 formula is unreasonable in violation of 15 U.S.C. § 1667b(b). Plaintiffs move for summary judgment on this claim, arguing that the paragraph 18 amount is unreasonable in light of the anticipated or actual harm caused by the early termination. In particular, they contend that the paragraph 18 formula shifts to early terminating lessees the risk that the residual value is inflated. Plaintiffs also aver that in circumstances where the residual value is greater than the realized value at early termination, the paragraph 18 early termination charge reflects an unlawful windfall to NMAC.

NMAC, too, seeks summary judgment on this claim, maintaining that the paragraph 18 charge is reasonable. In particular, NMAC urges that paragraph 18 renders a reasonable charge if the revenue neutral residual value is used.

15 U.S.C. § 1667b(b) states:

> Penalties or other charges for delinquency, default, or early termination may be specified in the lease but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the

> delinquency, default, or early termination, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.

The statute thus directs us to apply the amorphous concept of "reasonableness" to the early termination charges, and provides us for three touchstones for this analysis. As an initial matter, we must examine the meaning of "reasonable" as used in the statute.[70]

We first observe that the language of the statute mirrors that of UCC § 2-718[71], and the legislative history of the CLA shows that this is no coincidence:

> [§ 1667b] is intended to protect consumers from unwarranted penalties or forfeitures for delinquency or default, or whenever the lease

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[70]Typically, faced with a federal statute, our first recourse in interpretation would be to the federal case law that had developed around the provision. Here, however, there is a relative paucity of such precedent: the United States Code Annotated contains only nine case annotations for § 1667b, which reflect, owing to duplication, only five federal cases. The only Court of Appeals cases present in the annotations are the Channell and Highsmith cases already discussed, and none of the annotation cases is from our Circuit. The parties have not cited to any other cases from the Court of Appeals to guide us here.

[71]UCC § 2-718(1), codified in Pennsylvania as 13 Pa. Con. Stat. Ann. § 2718(a), reads:

> Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

1B Uniform Laws Annotated 508 (1989 & Supp. 2000)

> is terminated prior to its scheduled expiration. . . . The language is taken from the Uniform Commercial Code's provision on liquidated damages, and should be applied flexibly. Its purpose is to set a general guideline for lessors in writing their agreements, and, like other provisions of this Act, may be amplified in Board regulations.

S. Rep. No. 94-590 at 7 (1976) reprinted in 1976 U.S.C.C.A.N. 431, 437.[72]

Given this provenance of § 1667b(b), we look for guidance in interpretation to the drafters' Official Comment to UCC § 2-718(1). Paragraph 1 of that Comment states:

> [L]iquidated damage clauses are allowed where the amount involved is reasonable in the light of the circumstances of the case. [Section 2-718(1)] sets forth explicitly the elements to be considered in determining the reasonableness of a liquidated damage clause. A term fixing unreasonably large liquidated damages is expressly made void as a penalty. An unreasonably small amount would be subject to similar criticism and might be stricken under the section on unconscionable contracts or clauses.

1B Uniform Laws Annotated 508-09.

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[72]In addressing this legislative history, we are mindful that opinions differ as to the proper use, if any, of legislative history in construing a statute, see, e.g., William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621 (1990). See also Conroy v. Aniskoff, 507 U.S. 511, 519, 113 S. Ct. 1562, 1567 (1993)(Scalia, J., concurring) (noting Judge Harold Leventhal's description of the use of legislative history as the "equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends"). To the extent that we take the legislative history to confirm the UCC as the facially obvious source of § 1667b(b)'s language, we feel we are on relatively safe ground.

The language of § 1667b(b) also resembles section 356(1) of the Restatement (Second) of Contracts, which states that "Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty."[73] See, e.g., Kedziora, 780 F. Supp. at 519 (noting similarity). We therefore refer to the official commentary to that Restatement provision.

The Restatement's commentators remark that

> [T]he parties to a contract are not free to provide a penalty for its breach. The central objective behind the system of contract remedies is compensatory, not punitive. Punishment of a promisor for having broken his promise has no justification on either economic or other grounds and a term

[73]Both the UCC and the Restatement characterize an unreasonably large amount of liquidated damages as a "penalty" that is by its nature unenforceable. However, we note that the language of § 1667b(b) itself uses the term non-problematically: "Penalties or other charges for deliquency, default . . . ." We are thus confronted with the question of whether Congress, by the use of this term, meant to condone the application of penalties (which would otherwise be unenforceable in contract) in these circumstances. It seems clear that the use of this term does not authorize the assessment of penalties for early termination. First, and most significantly, the statutory language goes on to require that any such charges be reasonable in light of the anticipated or actual harm caused, a requirement that by itself bars the imposition of a "penalty" as defined by the UCC and Restatement. Further, the interpretive materials that we canvass in the text show that the sources upon which the statute was based unequivocally bar the application of a penalty for a breach of an agreement. We thus conclude that the appearance of the term "penalty" in § 1667b(b) does not alter our analysis.

> providing such a penalty is unenforceable on grounds of public policy.

Restatement (Second) of Contracts § 356 cmt. a. Moreover,

> two factors combine in determining whether an amount of money fixed as damages is so unreasonably large as to be a penalty. The first factor is the anticipated or actual loss caused by the breach. The amount fixed is reasonable to the extent that it approximates the actual loss that has resulted from the particular breach, even though it may not approximate the loss that might have been anticipated under other possible breaches. . . . Furthermore, the amount fixed is reasonable to the extent that it approximates the loss anticipated at the time of the making of the contract, even though it may not approximate the actual loss. . . . The second factor is the difficulty of proof of loss. The greater the difficulty either of proving that loss has occurred or of establishing its amount with the requisite certainty . . ., the easier it is to show that the amount fixed is reasonable. . . . If, to take an extreme case, it is clear that no loss at all has occurred, a provision fixing a substantial sum as damages is unenforceable.

Restatement (Second) of Contracts § 356 cmt. b. Finally, the validity of a damages term in an agreement depends on the effect of the term, not on the parties' intent or their characterization of it. We should look to the substance of the provision to determine if a contractual term constitutes a penalty, see Restatement (Second) of Contracts § 356 cmt c.

As a final source of interpretive assistance, we look to general federal contract law, which we find is consistent with the UCC and Restatement views of the issue presented above.

> Under federal contract law, contract provisions calling for the payment of damages

> that reasonably estimate the probable harm from a breach of the contract are allowable as liquidated damages. Contract provisions requiring the payment of damages that bear little or no relation to the probable harm resulting from a breach of contract are, by contrast, penalty clauses and are void and unenforceable as against public policy.

Robins Motor Transp., Inc. v. Associated Rigging & Hauling Corp., 944 F. Supp. 409, 411 (E.D. Pa. 1996) (citing Priebe & Sons, Inc. v. United States, 332 U.S. 407, 411-12, 68 S. Ct. 123, 125-26 (1947)).

With these tools to guide us in interpreting § 1667b(b), we move to consider the reasonableness of the paragraph 18 formula. The plain language of § 1667b(b), as well as the comments to the UCC and Restatement, suggest that the crucial aspect of our assessment here must be the harm caused to NMAC by the early termination. When a lease is terminated early -- leaving aside for the moment the existence of an early termination charge -- NMAC is in economic reality harmed by the fact that it will not receive the remaining monthly lease payments and that it has its property returned to it for disposition[74] earlier than it had expected. This latter "harm" is of course tempered by the fact that since the property is returned earlier, its value at the time of return is greater than was anticipated under the lease -- that is, it has depreciated less. It is difficult to qualify or quantify these harms

[74] It appears from the record that cars returned from lease are then sold at auction.

further, since in its briefs NMAC makes little effort to discuss the harms caused to it by early termination in comparison to the charge it levies on the consumer.[75]

NMAC does argue, though, that the charges levied[76] are reasonable in part because of the damage done to NMAC because the Roses and Miller failed properly to terminate their leases. As noted above, Miller failed to give thirty days' written notice, and the Roses both failed to give the written notice and turned the car into a Mitsubishi dealer.[77] As a preliminary matter, we find that these alleged damages cannot enter into our assessment of the reasonableness of the charges. While NMAC's records reflect the early termination of these leases, there is nothing in the record to suggest that NMAC sought to refuse terminations because of the lessees' procedural failures, nor that NMAC was not a willing participant in the terminations. Thus, since NMAC accepted without comment the lessees' performance of the early terminations, we will not hold against the plaintiffs any damages that NMAC caused itself by such acceptance.[78]

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[75]We find this passing strange, given the language of the statute.

[76]Here, NMAC was arguing as to the "remaining monthly payments" charge actually levied on the Roses and Miller, but the question of harm goes equally to the paragraph 18 charge and the remaining monthly payments charge.

[77]Albeit one associated with an adjoining Nissan dealership.

[78]Cf. Restatement (Second) of Contracts § 84 (promise to perform all or part of a conditional duty in spite of the non-
(continued...)

This question of damages aside, we are left to consider whether the early termination charge resulting from the application of the paragraph 18 formula to Miller's and the Roses' leases is reasonable. Again, while this amount was not actually charged to Miller or the Roses, it was a component of the calculation that was used to determine the amount that they did pay.[79]

As we begin this discussion it is useful to review the paragraph 18 charge. In the abstract, the paragraph 18 formula amount results from the subtraction of two terms. The first is the sum, discounted to current value, of all not-yet-due monthly payments plus the (also discounted) contract residual value of the vehicle. Subtracted from this amount is the second term: the "realized value" which for the purposes of the Rose and Miller calculations was the wholesale price of the vehicle as delineated in an industry database. By NMAC's calculation, the paragraph 18 amount using the contract residual for the Roses' termination two months early was $2,282.28, see Ex. C to Aff. of Mark Hoover, R.

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[78](...continued)
occurrence of the condition is binding), § 246 (obligor's acceptance of obligee's performance with knowledge of non-occurrence of a condition of the obligor's duty operates as a promise to perform in spite of non-occurrence), § 278(1) ("If an obligee accepts in satisfaction of the obligor's duty a performance offered by the obligor that differs from what is due, the duty is discharged.").

[79]In particular, the Roses and Miller paid the undiscounted sum of the remaining monthly payments as their early termination charge only because that amount was less than the paragraph 18 amount.

at 463. The paragraph 18 amount using the contract residual for Miller's termination one month early was $5,336.95, see Ex. G to Aff. of Mark Hoover, R. at 468. We have no difficulty concluding that these amounts are not reasonable as early termination charges under 15 U.S.C. § 1667b(b).

As discussed above, the letter of the statute, as well as the pertinent interpretive materials, show that the early termination charge must be a reasonable approximation of the harm -- either the actual harm or the harm anticipated at the time the agreement was drafted -- accruing to the lessor from the lessee's early termination. Putting aside for the moment the sheer dollar amounts, we find that a charge of over $2000 to the Roses could not be reasonable where, had they held the car to term, the further lease payments to NMAC would have totaled less than $500. Even taking into account any possible difficulties in NMAC's proof of loss, there is nothing in the record that would remotely suggest that NMAC suffered anything near $2000 in damages from the early termination. Similarly, there is nothing to show that the over $2000 charge would have been reasonable in light of any anticipated damages at the outset of the lease.

This logic also applies to the paragraph 18 amount calculated for Miller. Had he held his car for the remaining month of his lease, he would have paid an additional $267 to NMAC. In light of this "loss" to NMAC from early termination, the paragraph 18 charge of over $5000 is clearly unrelated to any cognizable economic harm from the early termination, either actual or anticipated, and is thus unreasonable.

Beyond this, however, we also find that the paragraph 18 formula used to calculate these numbers is itself unreasonable.[80] What the formula serves to do is to impose upon an early terminating lessee the risk that the contract residual overstates the value of the car[81], a risk that neither is imposed on lessees who carry their leases to term nor is related to any harm that accrues to NMAC as a result of the early termination.

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[80]We should note here that the use of this formula, or one similar to it, does not appear to be restricted to NMAC. The Official Comment to UCC § 2A-504 (a section we will discuss more below) states that, "A liquidated damages formula that is common in leasing practice provides that the sum of lease payments past due, accelerated future lease payments, and the lessor's estimated residual interest, less the net proceeds of disposition (whether by sale or re-lease) of the leased goods is the lessor's damages." 1B Uniform Laws Annotated 730 (1989 & Supp. 2000). NMAC's paragraph 18 formula is clearly very close to this in form. Nonetheless, the Comment goes on to say that, "Whether these formulae are enforceable will be determined in the context of each case by applying a standard of reasonableness," 1B Uniform Laws Annotated 730, and, as detailed below, we find that the paragraph 18 formula is not reasonable in the context of the Rose and Miller leases.

[81]This risk is present in the formula because the lessee pays, in addition to the discounted value of his remaining monthly payments, the difference between the discounted value of the contract residual and the realized value of the vehicle. Particularly when early termination occurs near the end of the lease, when the effect of discounting is minimal, this imposes against the early terminating lessee the amount by which the contract residual overstated the value of the vehicle. The sooner the lease is terminated, the smaller this difference will be, because the earlier the lease is terminated, the more the residual value will be discounted from the end of the lease, but the greater the realized value will be, since a younger car will, ceteris paribus, have a higher realized value.

Moreover, in the case of Miller and the Roses, there was not really a "risk" that the contract residual value would exceed the realized value -- it was a certainty. It is undisputed that NMAC understood at the outset that the contract residuals used in the Miller and Rose leases overstated the actual expected value of the car at the end of the lease.[82] As detailed above, the residual value NMAC applied to the Miller lease was 65%, while the revenue neutral residual -- representing NMAC's best estimate of the vehicles actual value at the end of the lease -- was but 56%. The early termination charge from paragraph 18 thus imposes on Miller not only the (NMAC-known) risk that the 56% revenue neutral residual overstates the realized value[83], but also recoups from him the nine point difference between the contract and revenue neutral residuals.

[82]In its brief, NMAC discusses the Official Commentary to Regulation M, which contains guidance as to the permitted derivation of the "estimated value of leased property at termination," see NMAC's Mem. of Law in Opp'n to Mot. for Summ. J. at 16 (citing Supplement I-CL-1 to Part 213 -- Official Staff Commentary to Regulation M ¶ 4(d)(3)). Though NMAC uses this passage to defend the manner in which it derives the revenue neutral residuals, we note here that it can have no application to the contract residuals, since NMAC knew that these numbers, inflated from the revenue neutral residuals in order to lower lease payments and increase the volume of leased vehicles, are not in fact the estimated end-of-the-lease value of the vehicles.

[83]As it happens, the 56% revenue neutral residual, applied to the Adjusted MSRP on the dealer lease worksheet, results in an amount of $12,412.96, which is in fact substantially more than the $9,225 realized value assigned to Miller's car, see also Ex. H to Aff. of Mark Hoover, R. at 469 (calculating the paragraph 18 charge using the revenue neutral residual).

Likewise with the Roses' lease. The contract residual NMAC assigned to the Rose lease was 61%, while the revenue neutral residual was 51%[84], and the paragraph 18 charge assesses against the Roses that ten point difference.[85] The paragraph 18 charge thus recouped for NMAC from the lessees a future loss that NMAC had willingly incurred when it entered into the lease, see Dep. of Robin Norris, R. at 140-41, namely, the difference between the revenue neutral residual and the contract (or "marketing") residual.

As stated above, there is nothing here to show that this charge was associated with or in compensation for any harm that cognizably befell NMAC as a result of the early termination -- recall, only early terminators were levied such a charge -- and therefore the formula itself is unreasonable pursuant to 15 U.S.C. § 1667b(b).[86] We will therefore grant judgment to the

[84]Recall that the residuals were raised two percentage points because it was a low-mileage lease.

[85]As it happens, the 49% revenue neutral residual, applied to the Adjusted MSRP on the dealer lease worksheet, results in an amount of $9,961.83, which is almost the same as the $9,950 realized value.

[86]We note that NMAC makes many arguments about the reasonableness of the charge that results from the use of the paragraph 18 formula with the revenue neutral residual value (as opposed to the contract residual), see, e.g., NMAC's Mem. of Law in Supp. of Mot. for Summ J. at 27 (arguing that the amount charged to Miller was reasonable because it was less than the revenue neutral residual paragraph 18 amount, which NMAC maintains is "indisputably reasonable under section 1667b(b)"). This amount, however, is inapposite to the question of the formula amount's unreasonableness here. There is no evidence to show that NMAC (or, rather, the Lease Master computer system)
(continued...)

[86](...continued)
ever calculates the paragraph 18 formula with the revenue neutral residual; in fact, as noted above, the revenue neutral residual value is not even shared with the dealership. In particular, there is no evidence to show that in the case of Miller or the Roses the paragraph 18 amount was calculated with anything but the normal variables, including the contract residual. Thus, other than calculations performed incident to this litigation, the revenue neutral residual is simply not a part of the paragraph 18 formula, and the reasonableness or lack thereof of amounts resulting from such an application is not at issue here.

Alternatively, another element of NMAC's argument with respect to the revenue neutral residual paragraph 18 amount appears to be an effort to show that even if the revenue neutral residual amount had been used in the paragraph 18 formula, the sum of the remaining payments would still have been a lesser amount and therefore the paragraph 18 formula did not affect the outcome of the early termination. We have discussed this issue in our standing analysis above, and our conclusion here is similar. Given (as argued) that plaintiffs would have ultimately paid the same amount even if the revenue neutral residual had been used in the paragraph 18 formula, it does not follow that the paragraph 18 formula is reasonable, not leastly because, in point of fact, the revenue neutral residual was not used for the Miller or Rose calculations, nor does it appear it is ever so used in the normal course of NMAC's business.

All NMAC's use of the revenue neutral residual with the paragraph 18 formula goes to show is that if NMAC plugs another, lower, number into the paragraph 18 formula, the resulting amount is also lower, and, in the case of the Roses and Miller, is closer to the amount resulting from summing the remaining monthly payments. To the extent NMAC uses this to show that the paragraph 18 formula was reasonable as to the Roses and Miller, the argument fails because the formula was not used in this way with respect to those lessees. To the extent NMAC uses this to show that the paragraph 18 formula is reasonable generally, the argument fails because this example does not demonstrate what the result would be in other cases, for example where a lessee seeks to terminate twelve months or twenty-four months early.

It also makes sense here to discuss a lingering dispute between the parties regarding the scope of discovery. In an Order dated July 12, 2000, which resolved the plaintiffs' motion to extend discovery and to compel certain depositions, we observed that the parties' pleadings reflected a disagreement as to the proper scope of discovery, and noted that since no class had yet been certified, discovery was properly limited to the claims made by the named plaintiffs, see Order of July 12, 2000 at 3 n.1. Based upon this, during the subsequent depositions of

(continued...)

plaintiffs on this claim.

4. Reasonableness Under 15 U.S.C. § 1667b(b) of the Sum of Monthly Payments Early Termination Charge

We now move on to consider the reasonableness of the amount that NMAC actually charged the Roses and Miller, namely, the undiscounted sum of the remaining monthly lease payments. Plaintiffs argue that this charge is unreasonable because it is undiscounted. NMAC, by requiring the payment of the sum of

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[86](...continued) NMAC's designees, NMAC's counsel directed witnesses not to answer, inter alia, questions that sought to elicit testimony regarding the reserves that NMAC or its parent took against the losses expected to be generated by the use of higher contract residuals, as well as other questions that sought other information about general NMAC lease practices that were not restricted to the two leases now before us. Similarly, plaintiffs aver, NMAC withheld (and is still withholding), on the grounds of attorney-client privilege, an internal NMAC document, mentioned during deposition testimony by Judith Holloway, that describes NMAC's policies with respect to early termination. The plaintiffs maintain that because of these discovery gaps, they require additional discovery regarding these general practices, see Rule 56(f) Decl. of Michael D. Donovan, Esq., Ex. [A], Pls.' Opp'n to Mot. for Summ J.

The plaintiffs also seek additional discovery as to the reasonableness of the revenue neutral residuals: the record shows that for the period and vehicles in question these residuals are set several percentage points higher than the ALG residuals, and therefore the plaintiffs question their reasonableness. Finally, the plaintiffs seek discovery as to the "hypothetical" calculations of paragraph 18 charges using the revenue neutral residuals that were discussed above in the text.

As detailed above, we find the paragraph 18 calculations using the revenue neutral residuals to be inapposite to the questions now before us, and therefore there is no need to permit any additional discovery as to them, or as to the revenue neutral residuals themselves. As to the other objected-to questions, we cannot see how additional discovery along the lines the plaintiffs proposed would be within the scope of the Roses' or Miller's claim, or indeed how it would affect our decisions here. We will therefore decline to afford further discovery.

remaining monthly payments without a discount, takes from the lessees the time value of the amount paid, and therefore the amount the lessees paid overcompensates NMAC for its losses. Plaintiffs also argue that the sum of the remaining payments is unreasonable in light of benchmarks established in UCC § 2A-504.

NMAC argues with respect to discounting that the undiscounted amount is reasonable because the amount of the alleged overcharge (the discount) is very small. NMAC also contends that the sum of remaining monthly payments is reasonable because it is less than the paragraph 18 amount calculated using the revenue neutral residual; because the latter number is reasonable, so must the sum of the remaining monthly payments, as it is less.

We first note that we have, in the margin above, addressed NMAC's argument regarding the revenue neutral residual paragraph 18 charge and its use as a benchmark for the reasonableness of the sum of the monthly payments. We found that such a use of the revenue neutral residual is inapposite to the facts of the Miller and Rose leases and that there is nothing to show that the amount resulting from such an application is necessarily reasonable. We therefore will not consider this argument further.

We also address as an initial matter the plaintiffs' claim that UCC § 2A-504 provides a benchmark for a reasonable liquidated damage amount here. UCC § 2A-504(3) states:

> If the lessor justifiably withholds or stops delivery of goods because of the lessee's default or insolvency (Section 2A-525 or 2A-526), the lessee is entitled to restitution of any amount by which the sum of his [or her] payments exceeds:
>
> (a) the amount to which the lessor is entitled by virtue of terms liquidating the lessor's damages in accordance with subsection (1)[87]; or
>
> (b) in the absence of those terms, 20 percent of the then present value of the total rent the lessee was obligated to pay for the balance of the lease term, or, in the case of a consumer lease, the lesser of such amount or $500.

Immediately we see the difficulty in attempting to apply these provisions -- and in particular the plaintiffs look to the "twenty percent or $500" calculation -- to the instant case: by its own terms, this provision only applies where the lessor withholds or stops delivery of the leased goods. The plaintiffs argue that this provision provides the formula for damages anytime a liquidated damages clause is found to be unreasonable, see Pls.' Mem. of Law in Supp. of Mot. for Summ. J. at 31, but we cannot see from the language of this UCC provision how this interpretation makes any sense when applied here. True, the twenty percent or $500 formula is applied if there is no liquidated damages provision, or even perhaps where such liquidated damages provision fails to meet the dictates of UCC § 2A-504(1), but again the whole section explicitly applies only to

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[87] UCC § 2A-504(1) states that the parties may specify liquidated damages in an amount or by a formula that is reasonable in light of the then anticipated harm caused by the default. The language of that paragraph is parallel, but not identical, to the language in UCC § 2-718(1).

circumstances where the lessor withholds delivery because of default or insolvency. As that clearly did not happen here (at the very least, there was no withholding of goods) we cannot import the damages formula from this UCC section into our case.[88]

Having dispensed with these arguments, we move to consider whether the failure to discount the sum of the monthly payments charged to the Miller and the Roses renders those charges unreasonable. We find that it does not.

Section 1667b(b) requires that an early termination charge be reasonable "in light of" the harm or anticipated harm imposed on the lessor by the early termination. Neither § 1667b(b) nor any of the interpretive materials we canvassed requires that such a charge be "less than or equal to" such harm, nor do they suggest that a charge that is even slightly greater than some measure of the harm would necessarily be impermissible as a penalty. As we said above, NMAC's harm stemming from the early termination is the loss of the remaining monthly payments and the car is returned for disposition sooner than NMAC had expected, thereby resulting in earlier-than-expected disposition

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[88]Even if we were to try to import this formula into our circumstances, we are not sure how it would work. Section 2A-504(3)(b) requires a lessor to pay back to the lessee, as restitution, the sum of the lessee's payments to the extent that those payments exceed the lesser of $500 or twenty percent of the present value of the total rent. That is, the lessor is only allowed to keep the lesser of $500 or twenty percent. Here, where the question is how much the lessee owes to the lessor -- rather than the opposite -- it is unclear how § 2A-504(3)(b) obtains.

costs and risks. Plaintiffs appear to concede implicitly[89] that had NMAC levied upon Miller and the Roses the discounted sum of the remaining monthly payments, such a charge would be reasonable, and we agree since this sum would compensate NMAC for the loss of the lease payments. Given its reasonableness, however, we cannot find that failure to discount that sum's monthly payments in calculating the amount actually charged to these plaintiffs created unreasonable charges to them.

The Roses terminated their lease two months early, and Miller only one month early, and the discounting of the monthly payments would logically be done at the rate implicit in the lease, pursuant to paragraph 18. The rate implicit in the Rose lease was 5.99%, _see_ Dep. of Jon Baird, Mar. 28, 2000, R. at 207, and the rate implicit in the Miller lease was 7.6%, _see_ Dep. of Jon Baird, Mar. 28, 2000, R. at 213. Thus, just as NMAC's representative Robin Norris testified, the gain to NMAC resulting from its practice of not discounting was "a couple bucks" as to the Rose and Miller leases, _see_ Dep. of Robin Norris, R. at 154. This slight overage is _de minimis_ and not enough, in the cases of Miller and the Roses, to render the early termination charge unreasonable in light of the harms to NMAC arising from the early

[89] Though plaintiffs argue that UCC § 2A-504 sets a maximum charge -- suggesting that they find the whole "sum of payments" concept unreasonable (whether or not discounted) -- the fact that the plaintiffs focus elsewhere in their papers on NMAC's failure to discount the sum of remaining monthly payments can only go to show that it is the amount of the discount, and not the charge subject to discounting, that they dispute.

termination pursuant to § 1667b(b).[90] We will therefore grant judgment to NMAC as to this claim.

III. Disposition

As noted, in addition to asserting claims under the CLA and Regulation M, plaintiffs also assert state law claims. For example, Count III states that the "early termination formula is

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[90]This is not to say that such an undiscounted charge would necessarily be reasonable in every case, particularly when the termination was far in advance of the end date of the lease so that the effect of discounting would be amplified.

We also pause here to note that our analysis of the Rose and Miller leases depended on a conclusion that may be less true for terminations far in advance of the lease end date. We have noted above that the harm accruing to NMAC from the early termination is the loss of the stream of monthly payments. While this is true -- or at least serves as a good approximation -- for terminations very close to the lease end date, it is not necessarily always true, for the following reasons.

As discussed at the outset of this opinion, the monthly lease payment is composed of two conceptually distinct charges. First, there is a depreciation charge, which is arrived at by subtracting the residual value from the "net cap value" and dividing the result by the number of months in the lease to yield an averaged monthly figure for the vehicle's depreciation over the life of the lease. Second, there is a lease finance charge, by which the lessee essentially compensates NMAC for the use of NMAC's asset over time. Assuming linear depreciation (which, we realize, is in fact not inevitably the case with all new automobiles), it should be the case that at the point where a lessee terminates his lease early, the market value of the car should exceed the residual value by exactly the amount of the sum of remaining monthly depreciation charges on the lease (assuming the residual value is an accurate prediction of end-of-lease market price, which, again, we realize was not our case here). NMAC can then, presumably, sell the vehicle for the market price and recoup the sum of the future stream of depreciation charges. Thus, when a lessee terminates early, the actual harm to NMAC is only the future stream of forgone lease finance charges. However, in the case of the Miller and Rose leases, where the early terminations were very close to the end of the lease, the monthly payments serve an economically reasonable approximation of the harm accruing to NMAC from the early termination, and we have conducted our analyses accordingly.

a penalty clause that is unenforceable under the common law governing liquidated damages, and under the Consumer Leasing Act”, Amended Compl. at ¶ 85. To this violation of state and federal law, plaintiffs seek “[d]isgorgement of early termination charges unlawfully assessed and collected”, Count III ad damnum (a). Counts V and VI seek relief under, respectively, the Pennsylvania Unfair Trade Practices and Consumer Protection Law and Uniform Commercial Code Art. 2A.

As far as the parties and our research has shown, there are no reported Pennsylvania cases dealing with the interplay of the CLA and Regulation M, on the one hand, and the cited sources of state law, on the other. The question of whether, and to what extent, the CLA and Regulation M preempt state law is one that at least one sister federal court noted, but did not decide. See Mitchell v. Ford Motor Credit Co., 68 F. Supp.2d 1315, 1319 (N.D. Ga. 1998); Eastwood v. General Elec. Capital Auto Lease, Inc., 825 F. Supp. 306, 310 (N.D. Ga. 1993).

It has also not escaped our attention that Miller and the Roses seek to be champions of a rather large class “of all persons with a[n] NMAC Closed-End Motor Vehicle Lease Agreement, either currently open, or terminated within the 12 month period preceding the filing of this complaint, for an aggregate amount of $25,000.00 or less used primarily for personal, family and household uses,” Amended Compl. at ¶ 66. We hasten to note, however, that neither Miller nor the Roses have yet filed a motion for class action certification.

It is also important to observe that these state law claims are almost certainly addressed to our supplemental jurisdiction under 28 U.S.C. § 1367. Although there happens to be diversity of citizenship between plaintiffs and NMAC, the particulars of both Miller's and the Roses' claims, even with trebling, place the amount in controversy far short of the jurisdictional threshold. Even the most expansive reading of ¶ 66 of the Amended Complaint leads to the same conclusion for the putative class.

If nothing else, Applebaum teaches that able Article III judges can reasonably disagree about this highly-technical area of federal law. In such perilous terrain, therefore, we are loath to embark upon a host of undecided questions of state law, as applied to the "thousands of Nissan Standard Leases outstanding nationwide", Amended Compl. at ¶ 69, when a real possibility exists that our Court of Appeals may not agree with the course we have taken, as it did in Applebaum with our learned colleague.

Under all of these circumstances, therefore, this case would seem to be quintessentially one where there is no just reason for delay as to the federal claims we have decided, within the meaning of Fed. R. Civ. P. 54(b). We thus will direct the entry of judgment for statutory damages only as to Counts I and II, and enter the declaration and injunction plaintiffs seek under Count IV, while deferring all other rulings pending final appellate action.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN MILLER et al. v. NISSAN MOTOR ACCEPTANCE CORPORATION	: : : : : :	CIVIL ACTION NO. 99-4953

ORDER

AND NOW, this 27th day of October, 2000, upon consideration of the parties' cross-motions for summary judgment (see docket nos. 32 and 34), and their responses thereto, and for the reasons set forth in the accompanying Memorandum, and pursuant to Fed. R. Civ. P. 54(b), it is hereby ORDERED that:

1. Defendant's motion for summary judgment is DENIED as to all federal claims, except it is GRANTED as to plaintiffs' claim as to the reasonableness of the early termination charges actually imposed on Miller and the Roses;

2. Plaintiffs' motion for partial summary judgment is GRANTED as to all federal claims, except as to plaintiffs' claim as to the reasonableness of the early termination charges, actually imposed on Miller and the Roses in accordance with the following paragraphs;

3. There being no just reason for delay, JUDGMENT IS ENTERED in favor of Brian S. Miller for $100.00, and Michael Rose and Michelle Rose for $100.00, and against Nissan Motor Acceptance Corp. as to Count I of the Amended Complaint;

4. There being no just reason for delay, JUDGMENT IS ENTERED in favor of Brian S. Miller for $100.00, and Michael Rose

and Michelle Rose for $100.00, and against Nissan Motor Acceptance Corp. as to Count II of the Amended Complaint;

5. As to Count IV of the Amended Complaint,

(a) This Court DECLARES that Nissan Motor Acceptance Corp.'s early termination formula presented in paragraph 18 of the plaintiffs' leases is a penalty clause that is unenforceable under the Consumer Leasing Act, 15 U.S.C. § 1667 et seq., and Federal Reserve Board Regulation M, 12 C.F.R. § 213 promulgated thereunder, and thus Nissan Motor Acceptance Corp. is not entitled to collect damages under this early termination formula from plaintiffs;

(b) Nissan Motor Acceptance Corp. is ENJOINED to credit the accounts and correct the credit records of plaintiffs, and from taking any action against plaintiffs inconsistent with the holding of this Court set forth in the Memorandum of even date;

(c) There being no just reason for delay, JUDGMENT IS ENTERED in favor of Brian Miller and Michael and Michelle Rose and against Nissan Motor Acceptance Corp.;

6. As to the remaining claims, the Clerk shall place them in CIVIL SUSPENSE pending further Order of this Court.

BY THE COURT:

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Stewart Dalzell, J.